

Exhibit No. 2

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Bill No. SB 306

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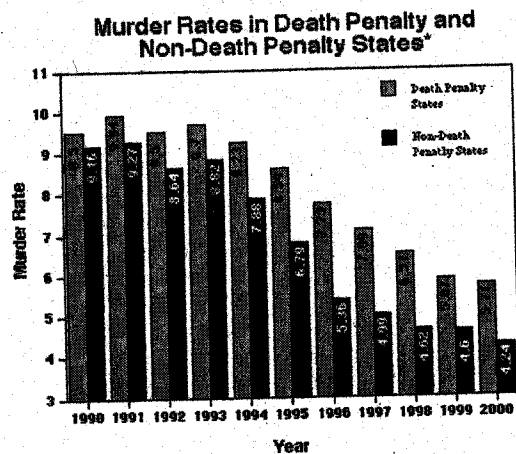
Carol Anderson, SJUD Secretary
Senate Judiciary Committee

February 7, 2007

Hearing on SB 306

*An Act Abolishing the Death Penalty and Replacing it
with Life Imprisonment without Possibility of Release*

Montana Death Penalty Fact Sheet



Who? Fairly Applied?

74 Individuals have been executed in the name of the territory and state of Montana. Of these, almost **23%** have been minorities. According to census data statistics from 1870 – 1990, the minority population has never been over 11.1%.

Nationally, death sentences are incurred for only about **1%** of homicides in the US known to Police; and only **2%** of people convicted of homicide are sentenced to death.

Innocence?

Between 1973 and the present, **123** individuals have been convicted, sentenced to death, and later exonerated of the crime for which they were convicted, some escaping the death penalty by mere hours. A study by Columbia Professor James Liebman concluded that **1 in 20** death row inmates is later found not guilty. *Statistics suggest that any state that preserves the death penalty will, at some point, put to death an innocent man.*

Wrongful Convictions in Montana?

In non capital cases the following men were wrongly convicted and later exonerated (by DNA) of the crimes for which they were accused:

- Jimmy Ray Bromgard (30 years for aggravated burglary, sexual intercourse without consent)
- Chester Bauer (30 years for rape and assault)
- Paul D. Kordonowy (40 years for sexual intercourse without consent)

Who has abolished the death penalty?

Every Western industrialized nation except the United States. Domestically, 12 states (including neighbor North Dakota), and all US territories have abolished the death penalty.

Cost?

Every state that has done a cost study of its death penalty study has found it be **substantially more expensive** where prosecutors seek lengthy prison sentences (LWOP) instead of the death penalty. These include studies or analysis in **TN, KS, IN, FL, NC, ID, TX, CA, CT, NJ**.

Cost Continued

Nationally, Only 10 – 30 % of individuals tried with capital cases are actually sentenced to death; and of these, 39% will be overturned by judicial review or clemency (Stewart). Death penalty cases incur numerous extra costs. In Montana, 46% of capital sentences have been overturned (6 of 13 convictions). Nevertheless, all cases where the prosecutor asks for the death penalty incur capital costs (due to the extra burden of the penalty and mitigating phases and the extra cost of additional, required counsel).

Murder Rates per 100,000 People

YEAR*	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995
Montana	1.9	3.2	3.3	1.8	3.8	1.8	2.6	4.1	4.8	3.9	3.0
North Dakota*	1.1	1.4	1.9	0.8	1.1	0.6	1.6	1.1	0.9	2.2	0.9
Wyoming	2.7	2.2	2.8	3.0	1.8	2.4	2.3	4.8	3.5	3.3	2.1
South Dakota	2.3	2.3	1.3	1.4	0.9	0.9	2.5	1.4	1.4	1.2	1.8
Idaho	2.4	2.2	1.8	2.7	2.3	1.2	2.0	2.9	3.2	3.6	4.1

*North Dakota is Montana's only neighbor without the death penalty and it is consistently lower than any of Montana or its neighbors in terms of murder rates (FBI Uniform Crime Statistics for 2005).

Deterrence?

A **2004 study** by economist Joanna M. Shepherd concluded that executions have **no effect** on the amount of murders in Montana.

18 of 20 states with the highest murder rates have and use the death penalty.

17 of the nation's **20** big cities with the highest murder rates are in death penalty jurisdictions.

A 1995 poll by the National League of Cities placed the death penalty **last** in a long list of measures most likely to reduce crimes (State of American Cities, 1/1995). Another 1995 poll of the nation's police chiefs revealed that the police **do not believe** the death penalty is effective in fighting crime, and most said it is not an effective law enforcement tool (Murphy, *Death Penalty Useless*).

Over two decades, the neighboring states of Indiana (which regularly imposes death sentences) and Michigan (with no death penalty), have had **virtually indistinguishable homicide rates** (The Death Penalty, ed. By Hayley R. Mitchell, p. 64).

Immediate impact studies that compare the homicide rates following a highly publicized execution have found **no decrease** in murders directly after the execution and actually found that the murder rate **increased** (Dann, 1935; Thompson, 1999).

Montana Execution Statistics (2007):

	Number Executed	Percentage of Total
White	57	77.03%
Black	9	12.16%
Native American	5	6.76%
Asian	2	2.70%
Hispanic	1	1.35%
(Minority Total)	17	22.97%
Total	74	100 %
Male	74	100%
Female	0	0%

**According to Census data statistics from 1870 – 1990, the minority population has never been over 11.1%*

For Immediate Release

Further information:

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Kaczynski, Hilton, and Millsap to Headline Death Penalty Forum

Helena, Mont. __David Kaczynski, brother of the "Unabomber" Ted Kaczynski; Gary Hilton, former warden of the New Jersey State Prison; and former Texas prosecutor Sam Millsap will headline a public forum on the death penalty Feb. 6, 2007 in Helena. The event is sponsored by the Montana Abolition Coalition; comprised of the Montana Association of Churches, Montana Catholic Conference, Amnesty International, Montana Human Rights Network, and the ACLU of Montana.

In 1996, David Kaczynski turned in his brother, Ted, to the authorities after suspecting Ted might be the infamous "Unabomber" who had killed three and injured 23 people with mail bombs. Soon thereafter, David was horrified to find that the authorities whom he had so recently helped were charging Ted with a capital crime for which he could face death.

"It didn't seem to concern prosecutors that my brother was mentally ill with schizophrenia, or that executing him would discourage other families from following our example in the future," David Kaczynski said. David Kaczynski now serves as Executive Director of New Yorkers Against the Death Penalty.

Gary Hilton was a warden with the New Jersey Department of Corrections for 33 years before his retirement in 1998. At the beginning of his career, he firmly believed in the death penalty but over the course of his career, he came to believe "that execution is not sound or proper public policy. The irreversible reality of execution must be a major consideration." From his experience as a warden, Hilton now believes the harsh realities of prisoners living out their normal lives in maximum security with no chance of parole serves justice in a more equitable way for all parties, including victims' families.

As a Texas District Attorney, Sam Millsap prosecuted Ruben Cantu, who was executed in 1993. After Cantu's execution, the *Houston Chronicle* uncovered evidence proving Cantu's likely innocence. Millsap says Cantu "received a perfect trial. And yet, we have determined 21 years later that he may well have been innocent. Whether he was innocent or not, the system failed him completely. The system as it relates to capital murder is simply broken," Millsap said.

The panel will also include two relatives of murder victims, including J.A. "Ziggy" Ziegler, whose father was murdered in Los Angeles. Ziegler, a former Yellowstone County Commissioner, now conducts a prison ministry with inmates and assists in the rehabilitation of released convicts.

Marietta Jaeger Lane, the mother of a murder victim, will also participate in the panel. Her seven-year-old daughter was abducted and subsequently murdered in 1973. "In my case, my own daughter was such a gift of joy and sweetness and beauty, that to kill someone in her name would have been to violate and profane the goodness of her life," said Jaeger Lane. "The idea is offensive and repulsive to me." Jaeger Lane is a co-founder of Journey of Hope, an organization which conducts public education speaking tours and addresses alternatives to the death penalty.

The Montana Legislature is now considering a bill to abolish the death penalty. The legislation's hearing is slated for 8:00 a.m., Wednesday, February 7, 2007, before the Senate Judiciary Committee, located in Room 303 of the Montana State Capitol Building.

The Death Penalty Forum will be held Feb. 6, 2007, in Helena at the Carroll College Commons from 7:00 to 10:00 p.m. The forum is free and open to the public. For further information, contact Ginger Aldrich of the Montana ACLU, at 406-461-8176 or gingera@aclumontana.org.

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Montana State Senate



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The Big Sky Country

MONTANA NEEDS TO ABOLISH DEATH PENALTY

Dear Editor,

After some 30 plus years of public service, I am coming to the end of my term in the Montana Senate. It seems all together fitting and proper that I conclude my service fighting for an issue that I fought for when I began my service as a member of the Montana Constitutional Convention in 1972. I am pleased to bring before the Senate SB 306 - a bill to abolish the death penalty in Montana. I opposed capital punishment back then; and for numerous reasons, I oppose it even more today.

One major reason is the simple fact that since 1973, over 123 death row inmates have been exonerated of the crimes for which they were accused! Innocent people are being executed in the United States. The *Stanford Law Review* has detailed 23 cases where innocent people have already been executed. Columbia University professor James Liebman conducted a study of thousands of capital sentences reviewed by courts in 34 states from 1973 to 1995 and concluded, "One in twenty death row inmates is later found not guilty."

In Montana, wrongful convictions have already occurred in non-capital cases. For example, Jimmy Ray Bromgard was convicted and sentenced to 30 years in prison for aggravated burglary and sexual intercourse without consent. After almost 16 years in prison, he was exonerated by updated DNA technology.

The death penalty comes from earlier days of barbarism when slavery, whipping, branding, and other corporal punishments were commonplace. Like those other practices, state-sponsored executions have no place in a civilized society. Of all Western industrialized nations, the United States alone engages in this lethal practice.

Capital punishment denies due process of law. Its imposition is often arbitrary - forever depriving an individual of the opportunity to benefit from new evidence or the setting aside of a death sentence.

Opposing the death penalty does not mean sympathy with convicted murderers. Murder clearly demonstrates a lack of respect for human life. Murder is abhorrent and a policy of state-sponsored killing is immoral. Killing more people only epitomizes the tragic brutality of violence, rather than utilizing reason to solve difficult social problems.

A society that respects life does not deliberately kill human beings. An execution is a violent public spectacle of official homicide, one that endorses killing to solve problems - the worst possible example to set for the citizenry. The benefits of capital punishment are illusory, but the bloodshed and the resulting destruction of community decency are real.

Approximately 90% of those on death row could not afford to hire a lawyer when they were tried. A defendant's poverty, lack of firm social roots in the community, inadequate legal representation at trial or on appeal – all these have been common factors among death-row populations. "One searches our chronicles in vain for the execution of any member of the affluent strata in this society," wrote Justice William O. Douglas in *Furman v. Georgia*, 408 U.S. 238.

In Montana, the death penalty is applied discriminatorily. 74 individuals have been executed in the name of the territory and state of Montana. Of those, almost 23% have been minorities. According to U.S. Census data statistics from 1870 – 1990, the minority population has never been over 11.1% in Montana. Thus, the rate of executions of minorities in Montana is almost twice the highest occurring combined minority percentage of the population.

Research shows that juries are more likely to convict defendants of color. Between 1995-2000, 75% of federal cases in which juries recommended the death penalty involved black or Latino defendants.

Does the death penalty deter crime? To cite one example among many, the FBI reports that homicide rates for North Dakota, Montana's only abolitionist neighbor, are consistently lower than Montana's rates of homicides. Does the death penalty save money? Every state that has done a cost study of its death penalty system has found it to be substantially more expensive than cases where prosecutors instead seek life without parole.

For the above reasons and many more, I hope your readers will join me in abolishing the death penalty in Montana.

Sincerely,

/s/ Dan Harrington

State Sen. Dan Harrington

FINAL

For Release January 22, 2007

Senior Legislator Proposes Death Penalty Abolition Bill

Senator Dan Harrington (D-Butte) has introduced legislation that would abolish the death penalty in Montana. Harrington, a veteran of both houses of the Montana legislature and a Montana Constitutional Convention delegate, is serving as the President Pro Tempore of the Montana Senate for the 2007 Legislature. If Harrington is successful, Montana would join 12 states, the District of Columbia, and 123 countries which have abolished the death penalty in law or practice.

"The death penalty is barbaric, discriminatory, ineffective and costly," Harrington said. "Let's use the money we save by abolishing the death penalty to implement real, effective crime-reducing measures. Let's invest in better law enforcement equipment and investigative resources rather than perpetuating an archaic system of corporal punishment."

Members of Montana's faith communities share the belief that the death penalty should be abolished on moral grounds. "A long history of Judeo-Christian religious tradition calls for compassion and forgiveness. Capital punishment negates the respect for the sanctity of human life, and it extinguishes the possibility for rehabilitation and restitution," said Moe Wosepka, Executive Director of the Montana Catholic Conference.

The Reverend Brady Vardemann, Executive Director of the Montana Association of Churches agrees. "The sacredness of life is inherent in faith. Capital punishment feeds the cycle of violence, rather than ending it. We seek a justice which prevents violent offenders from injuring others yet recognizes the possibility of reconciliation and redemption."

Scott Crichton, Executive Director of the ACLU of Montana concurs with the notion that capital punishment should be abolished in Montana. Referring to a 2004 study by economist Joanna M. Shepherd, he said, "Not only do tremendous court and administrative costs make the death penalty more expensive than life without parole, Shepherd's study has shown that it simply does not serve as a deterrent to crime in Montana. Nationally, over a hundred innocent people have been released from death row - some only hours from execution. The significant risk that innocent people have been and will continue to be executed is too great to retain the death penalty."

Local human rights advocates have also expressed support for the bill. Travis McAdam, Acting Director of the Montana Human Rights Network, said, "The death penalty is cruel and unusual punishment and forces the State to commit revenge-based murder. Studies have also shown that the death penalty is applied unequally, with people of color and of low-income receiving it when white people committing the same crimes get life in prison. Finally, it has not been proven to act as a deterrent to crime."

The Montana Abolition Coalition, an alliance of the ACLU of Montana, the Montana Catholic Conference, the Montana Association of Churches, the Montana Human Rights Network, Amnesty International, and Murder Victims' Families for Reconciliation, is supporting the legislation. The Abolition Coalition is sponsoring a public forum regarding the death penalty at Carroll College during the week of the hearing.

The Abolition Coalition hosts a death penalty blog with links to all of its members at <http://www.nomontanadeathpenalty.blogspot.com/>. Current information relating to state, national, and international efforts to abolish the death penalty may be found on the website.

Senate Bill 306 is sponsored by Sen. Dan Harrington (D-Butte) and has been referred to the Senate Judiciary Committee. Hearings on the bill are expected on February 7, 2007.

-end-

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Equal Protection and the Death Penalty

Mr. Chairman and Members of the Committee. My name is Amanda Arnold and I represent the Montana Human Rights Network. We strongly urge you to support SB306.

The most compelling argument for the continued use of the death penalty is the need to avenge a heinous crime. However, this argument is insufficient to warrant the application of this penalty, since it violates the right of every citizen to receive equal protection under the law as enshrined in the Constitution of the Great State of Montana, the United States Constitution, and the Universal Declaration on Human Rights (see sections below).

[T]he dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his [or her] civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

- Article 2, Section 4 of the Montana Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

- Amendment 14, Section 1 of the U.S. Constitution

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this declaration and against any incitement to such discrimination.

- Article 7, The Universal Declaration of Human Rights

There are several ways in which the application of the death penalty violates this right to equal protection under the law. Most prominently, these include the facts that the death penalty is applied inconsistently and arbitrarily to murder crimes, as well as to cases based on the race and socio-economic status of the defendant and victim.

Issue 1: Disproportionality of capital sentencing based on type of crime

Findings from a 2006 government report¹ on the application of the death penalty indicate that capital sentencing is applied arbitrarily and disproportionately across jurisdictions. In a study of over 600 capital sentence narratives, research showed this lack of uniform application of the death penalty. "The resulting unfairness leaves one defendant on death row while others, having committed very similar offenses, were sentenced to life in prison..."

The conclusion of this study highlighted the high probability that the death penalty is applied arbitrarily. Due to the finality of the death penalty, the risk to the justice system of the unequal protection exemplified in this study is absolutely unacceptable.²

¹ *New Jersey Death Penalty Commission Report*, January 2007. Available online at http://www.njleg.state.nj.us/committees/dpsc_final.pdf



² Issue 5: Whether there is a significant difference in the crimes of those selected for the punishment of death as opposed to those who receive life in prison, (*New Jersey Death Penalty Commission Report*, January 2007). http://www.njleg.state.nj.us/committees/dpsc_final.pdf pg 50

Equal Protection and the Death Penalty

Issue 2: Disproportionality of capital sentencing based on racial bias and socio-economic status

There is no doubt that the death penalty disproportionately affects non whites and people of low socio-economic status. According to the United States General Accounting Office, one of the key indications of racism in the system is that the defendant in the case of a white victim is more likely to receive the death penalty than the defendant in a case involving a non-white victim.³

Indeed, this is echoed in NAACP (National Association for the Advancement of Colored People) data which reveals that black defendants in the case of a white victim are over 14 times more likely to face the death penalty than are white defendants in the case of a black victim (see table below).

PERSONS EXECUTED FOR INTERRACIAL MURDERS IN THE U.S. SINCE 1976	The cases represented in this graph are cases of one defendant executed for the murder of one or more victims of one race. Cases involving multiple victims of several different races are not included here.	White Defendant / Black Victim (15)  Black Defendant / White Victim (213) 
		(Death Row Population Figures from NAACP-LDF "Death Row USA (October 1, 2006)"

Apart from this evidence indicating racial bias in the application, there is also clear evidence that people of low socio-economic status are statistically more likely to receive the death penalty.

According to another study, this one in Virginia, there is an undeniable connection between defendants who receive the death penalty and the low quality of that defendant's state-appointed trial attorney. In fact, this study found, "In one of every ten trials resulting in a death sentence, the defendant was represented by a lawyer who would later lose his license to practice law."⁴

There is much to support the accusation that the death penalty is not applied equally across racial and socioeconomic lines. Since the State cannot ensure the equal application of the death penalty even to similar crimes and irregardless of race, socioeconomic status, etc., it has no option but to cease the use of this particular penalty immediately.

For these and the many other reasons you have heard today, I urge you to give SB306 a DO Pass.

Thank You.

³ United States General Accounting Office, Death Penalty Sentencing, February 1990

⁴ This study requested public disciplinary information for every lawyer it could confirm had been appointed to represent a prisoner on death row. That amounted to 135 attorneys. Eight of those lawyers had been publicly disciplined. Four had seen their licenses revoked or had surrendered their licenses with charges pending. Three had been suspended from the bar altogether. None of these disciplinary actions stemmed from representation in a capital case, and three of the lawyers in this group had represented more than one capital defendant who was sentenced to death. *Broken Justice: The Death Penalty in Virginia* (2/10/2004) Available online at http://www.aclu.org/FilesPDFs/broken_justice.pdf

Testimony of
Senator Dan Harrington

SPONSOR

SB 306

An Act Abolishing the Death Penalty and Replacing it with Life Imprisonment without
Possibility of Release

Senate Judiciary Committee Hearing

February 7, 2007

Mr. Chairman and members of the committee, after over 30 years of public service, I begin the conclusion of my public duties fighting for an issue that I fought for when I began my service as a member of the Montana Constitution Convention in 1972. I am pleased to introduce Senate bill 306, an act to abolish the death penalty in Montana and replace it with life imprisonment without possibility of release. I opposed capital punishment back then; and I oppose it even more today.

Once, during wild and wooly frontier days, a collapsible gallows traveled around the state and executions were public spectacles for anyone to watch. Now, they have become secretive, as if we, the public, are afraid to witness the sentence passed by the courts. As if we must now hide the act because it is grotesque - *and it is grotesque.*

You know - the executioner's identity is hidden for several reasons - and one of them is symbolic. Traditionally, he wears a hood as an emblem that *every* adult Montanan, collectively, imposes the ultimate penalty on those convicted of capital crimes. Although we have sanitized the act of putting these people to death, the idea is still very personal. Have you thought of your own hand putting these people to death? Because it *is* your hand, and mine - and every adult Montanan that communally signals the end of a human life. Do we, as lawmakers, have the right to demand that every Montanan perpetuate this ugly tradition?

In 1958, the U.S. Supreme Court wrote, "Evolving standards of decency... mark the progress of a maturing society." Let us embrace Montana's maturing standards of decency. Let us abolish the death

penalty for once and for all. Let us mark, today, the evolution of Montana's society into the 21st Century. Let us mark the day we join with twelve other states, including our neighbor, North Dakota, and our international neighbors - Canada and Mexico - that we would join with *every other* Western industrialized nation in abolishing the death penalty.

This is the gravest of all matters that can ever come before you – it is the *very* solemn matter of life and death. And shouldn't *life* be every lawmaker's default vote, unless compelling testimony is presented to justify incurring death?

To vote to *retain* the death penalty, to vote to *preserve* the status quo, you must be absolutely sure – *absolutely* sure – on behalf of yourself *and* your constituents *and* every citizen of the state of Montana – that the system is equitably and fairly enforced – whether the defendant be black or white or brown or red, whether the defendant be poor or rich or well-connected or not. We owe it to the people of Montana, as legislators, to provide the framework for a legal system which administers impartial and unbiased justice. And yet, only 2% of people convicted of homicides are sentenced to death. *Is that fair?* Those who are poor are more likely to be convicted of a capital crime because they cannot afford quality legal representation. And, in fact, *no state*, including Montana, has met the standards developed by the American Bar Association for appointment, performance and compensation of counsel for indigent prisoners. *Is that fair?* Those who kill a white victim – as opposed to any other race – are more likely to be convicted of a capital crime. *Is*

that fair? Scholars have shown time and time again that the death penalty is not now, has never been, and can never be applied fairly.

Fellow senators, you must be *absolutely sure* that there is *no* chance that an innocent person could be executed. And yet, 123 people on death row have been exonerated of the crime for which they were accused. It took those who were exonerated an average of *nine years* of incarceration to prove their innocence. In fact, 1 in 20 death row inmates is later found not guilty. And a 1987 study detailed 23 cases where innocent people had already been executed.

You must be *absolutely sure* that the death penalty deters crime, if that is its purpose. And yet, a 2004 study by an economist, Joanna M. Shepherd, showed that executions have *no effect* on murders in Montana.

You must be *absolutely sure* that the excess dollars we expend to perpetuate an ancient and barbaric system of punishment are not better spent on other areas of public safety, areas that have *proven* to have real and meaningful results such as more public safety officers and better equipment. Life without parole provides a less costly, expedient, and safe way to permanently protect members of the community from convicted murderers – and it is, in fact *cheaper* than capital punishment. Every state that has ever undertaken a cost study of its death penalty system has found capital cases to be substantially more expensive than cases where prosecutors seek lengthy prison sentences, including Tennessee, Kansas, Indiana, Florida, North Carolina, Idaho, Texas, California, Connecticut, and New Jersey. And almost half – 46% in Montana - of those who are

convicted in the lengthy and costly capital trial process are eventually resentenced to an extended life sentence anyway!

You must be *absolutely sure* that the best way for families of murder victims is not the certain, swift sentence of Life Without Parole, but the long and rocky road of capital sentencing and appeals. You must be *absolutely sure* that their best interests are at heart when convicted murders can dominate the national spotlight again and again and again, instead of being segregated to a lonely and long life in prison, with the full understanding that they have been judged unfit to enter society ever again.

And lastly – and perhaps most importantly – you must be *absolutely sure* that our belief in human life is such that we teach our children that to prevent violence, we beget violence, that legalized murder is the answer to unlawful murder.

Of *all* these things, you must be sure – for this is the gravest matter of life and death.

I am confident that the testimony you will hear today from a wide array of those more intimately involved with the criminal justice system than myself will prove to you that not only does this matter deserve thoughtful consideration before the entire Senate, it is one that you cannot – when all the facts are on the table -- retain. All I can ask is that you give careful deliberation to the words and experiences of those who testify here today.

Thank you for your attention, Mr. Chairman and members of the Committee. I reserve the right to close.

Testimony of
Daniel P. Doyle, Ph.D.

SB 306
An Act Abolishing the Death Penalty and Replacing it with
Life Imprisonment without Possibility of Release
Senate Judiciary Committee Hearing
February 7, 2007

My name is Dan Doyle and I am a Professor of Sociology and Criminology at the University of Montana. I want to be clear for the record I am here on my own time and at my own expense and not as a representative of the University of Montana or the UM Department of Sociology. I am providing this testimony as a criminologist who has studied the research literature on the death penalty for about 30 years. I have been asked to speak primarily about the issue of deterrence as it applies to the death penalty.

It has long been assumed that execution deters murder--that fear of the death penalty will dissuade potential murders to a greater extent than an alternative sentence like life in prison without possibility of parole. But, the research done by criminologists has not shown a deterrent effect of the death penalty on murder and a consensus has developed among criminologists and most other social scientists that deterrence doesn't work in murder cases. There have been a small handful of studies by a few economists that purport to show a deterrent effect of the death penalty (Eg.: Ehrlich, 1975; Mocan and Gittings, 2003; Dezhbakhsh et al., 2003). But their complex econometric models have been clearly shown to be fraught with very serious conceptual and technical errors (Eg.: Goertzel, 2004; Berk, 2005; Fagan, 2005; Donohue and Wolfers, 2006). Subsequent reanalysis of these data show that the supposed deterrent effects are not real but rather are statistical artifacts.

There are many others studies that have shown not only that execution does not deter murder but that it may actually encourage murder. For example, if the death penalty truly deters murder, we would expect that states with the death penalty (especially states that use the death penalty a lot) would have lower murder rates. In fact, the data show that the opposite is true. States with the death penalty actually have higher rates of murder compared to states without the death penalty (Death Penalty Information Center, 2007). Likewise, if you compare similar, adjacent states where one has the death penalty and the other does not, states with the death penalty have higher murder rates (Peterson and Bailey, 1988). Similarly, comparisons of counties with and without the death penalty yield the same findings (Harries and Cheatwood, 1997).

There is justifiable concern that the death penalty can have the unintended consequence of actually increasing murder rates. Research shows that after an execution, rates of some kinds of homicide often exhibit a small but measurable increase (Bowers and Pierce, 1980; Bowers, 1988; Costanzo, 1997; Bailey, 1998). It has been argued that by executing convicts, the state sends out the message that killing is a proper way to handle perceived wrongs. Also, executions may very well stimulate murders by persons who are already unstable or who are seeking a kind of pseudo martyrdom or who want the state to help them commit suicide. Some murderers enjoy the attention that an execution brings (Costanzo, 1997).

On the face of it, the idea of deterrence makes sense. So why doesn't it work in capital cases? Logically, in order for deterrence to operate, a number of factors have to come together simultaneously: 1) there has to be a degree of rational calculation on the part of the offender; 2) there has to be a perceived certainty of punishment; and 3) the punishment has to be imposed soon after the crime takes place. The likelihood of these factors coming together simultaneously in capital cases is exceedingly remote.

- First, the potential offender has to be willing and able to engage in a kind of rational calculation, weighing perceived potential risks and benefits. This is simply not a common characteristic of most criminals in general and most murderers in particular.

These are people who do not think things through before they do them. They tend to act impulsively, seldom considering the consequences of their actions on themselves or others. Murders are frequently committed in the heat of an altercation or in the midst of another crime, such as a robbery, where rational calculation is unlikely. The vast majority of known murderers have alcohol, drug, and/or psychological problems that further decrease their ability to take into account the risks associated with their actions.

- Second, research shows that for deterrence to be effective, the offender must believe that there is a high likelihood of being caught and punished--in this case being executed rather than being locked up for life. But the experience of most criminals is that they are rarely caught and punished for any criminal act. Researchers have interviewed prison inmates incarcerated for homicide and found very few inmates believed that there was any chance that they would be caught and very few had an accurate idea of what punishments they faced if caught (Kohen and Jolly, 2006). Consequently, fear of execution isn't an issue for them before they get caught since they aren't clear what kind of punishment they face and don't believe that they were going to get caught anyway. Statistically, the true risk of any given murderer being executed is infinitesimal. There were almost 17,000 murders in this country last year and only 53 executions. So the actual chances of a murder resulting in an execution are about 3/10ths of 1%.
- Third, research shows that in order for deterrence to be effective, the punishment has to come rapidly after the crime. Given the safeguards that are required under the law to protect the due process rights of those accused of murder, this simply is not possible. Speeding up the process would result in more violations of defendant constitutional rights and more instances of faulty convictions.

The consensus of social scientists is that the death penalty does not deter any more than a sentence of life without possibility of release. And there is evidence that the use of the death penalty can even increase homicides. This consensus is reflected in the fact that the American Psychological Association, the professional association of research, academic, and practicing psychologists, the American Sociological Association, the professional association of sociologists, and the American Society of Criminology, the largest professional association of criminologists have all passed resolutions calling for an end to the use of the death penalty. And this is not just the opinion of academic researchers. The American Society of Criminology includes in its membership many working in law enforcement and corrections. A recent surveys of police chiefs showed that the majority of these law enforcement professionals do not believe that the death penalty is an effective law enforcement tool (Death Penalty Information Center, 2007).

Based on the research findings I've talked about today as well as other factors, I encourage you to support SB 306 to abolish the death penalty and replace it with the sentence of life imprisonment without possibility of release. Thank you.

References

- Bailey, William. 1998. Deterrence, Brutalization, and the Death Penalty: Another Examination of Oklahoma's Return to Capital Punishment." *Criminology* 36:711.
- Berk, Richard. 2005. "New Claims about Executions and General Deterrence: Déjà vu All Over Again?" *Journal of Empirical Legal Studies*.
- Bowers, William. 1988. "The Effect of Execution is Brutalization, Not Deterrence." In *Capital Punishment: Legal and Social Science Approaches*, edited by Kenneth C. Hass and James A. Inciardi. Newbury Park, Calif.: Sage.
- Bowers, William and Glen Pierce. 1980. "Deterrence or Brutalization: What is the Effect of Executions?" *Crime and Delinquency* 26: 453.
- Costanzo, Mark. 1997. *Just Revenge: Costs and Consequences of the Death Penalty*. New York: St. Martins Press.
- Death Penalty Information Center. 2007. <http://www.deathpenaltyinfo.org/>.
- Dezhbakhah, H., P. H. Rubin, and J. M. Shepherd. 2003. "Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data." *American Law and Economics Review* 5: 344.
- Donohue, John J. and Justin Wolfers. 2006. "The Death Penalty: No Evidence for Deterrence." *Economists' Voice* 3(5): Article 3.
- Ehrlich, Isaac. 1975. "The Deterrent Effect of Capital Punishment: A Question of Life and Death." *American Economic Review* 65: 397.
- Fagan, Jeffrey. 2005. "Deterrence and the Death Penalty: A Critical Review of New Evidence." Testimony before the New York State Assembly Standing Committees on Codes, Judiciary, and Correction, January 21, 2005.
- Goertzel, Ted. 2004. "Capital Punishment and Homicide: Sociological Realities and Economic Illusions." *Skeptical Enquirer* 28(4): 23.
- Harries, Keith and Derral Cheatwood. 1997. *The Geography of Execution: The Capital Punishment Quagmire in America*. Lanham, Md.: Rowan & Littlefield.
- Kohen, Ari and Seth Jolly. 2006. "Deterrence Reconsidered: A Theoretical and Empirical Case Against the Death Penalty." Paper presented at the annual meeting of The Midwest Political Science Association, Chicago, April 20, 2006.
- Mocan, Naci and Kaj Gittings. 2001. "Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment." *Journal of Law and Economics* 46: 453.
- Peterson, Ruth D. and William C. Bailey. 1988. "Murder and Capital Punishment in the Evolving Post-Furman Era." *Social Forces* 66:774.

Dr. Daniel P. (Dan) Doyle, Ph.D.

Dr. Daniel P. (Dan) Doyle is Professor of Sociology and Criminology at the University of Montana, Missoula. He received his bachelor's degree from U.C.L.A. and his master's degree and Ph.D. at the University of Washington. He has been a member of the faculty at the University of Montana for almost 17 years. He teaches and does research in a variety of areas in criminology and criminal justice. His recent research included an evaluation of anger management, substance abuse, and sex offender treatment programming in the Montana state prison system. He is currently the principle investigator for the Missoula Arrestee Drug Use Monitoring Study, analyzing the relationship between substance abuse and criminal behavior by arrestees in Missoula County.

Professor Doyle is testifying as a criminologist and not as a representative of the University of Montana or the UM Department of Sociology.

Senate Bill 306
Senate Judiciary
February 7, 2006

Testimony of Betsy Griffing
Legal Program Director
ACLU of Montana
Former Assistant Montana Attorney General

Mr. Chairman and Members of the Committee:

I do not envy you this task – this weighty and serious task of allowing the death penalty in Montana to go forward. I am not here to appeal to your moral or ethical senses or legal and constitutional beliefs. Instead, I am here to address that all important function of the legislative branch – its power of the purse.

I am here today to talk about the great financial costs of a death penalty prosecution. I have attached as an Exhibit to my testimony a chart that shows why just the trial costs of a death penalty case far exceed the costs of a non-death penalty trial. I have also attached as an Exhibit a listing of those death penalty cases that arose in Montana since 1973 to the present. Although there are few hard numbers in Montana with respect to a comparison of the costs of death penalty cases vs. non death penalty cases, I can provide personal and first-hand testimony concerning the greater financial burden on the state regarding such cases.

For almost 5 years I was Bureau Chief of the Appellate Bureau at the Montana Attorney General's office and coordinator of a Death Penalty Task Force in that office. I was the supervising attorney for the Death Penalty Team that represented the State of Montana in the execution of Duncan McKenzie in 1995. Over the 9 years at the Attorney General's office I was the supervising appellate attorney for all of the 9 death penalty cases on appeal at that time: Terry Langford, David Dawson, Vern and Lester Kills On Top, Dan Johnson, Dewey Coleman, Douglas Turner and Rodney Sattler. I personally handled the appeal of Ronald Allen Smith twice before the Montana Supreme Court and in the federal court system.

In a non-death penalty case there is generally only one prosecuting attorney and one defense counsel. In a death penalty case, and in order to assure proper representation and procedures, there are at least two prosecuting attorneys – the local county attorney and an attorney from the Montana Attorney General's office and two public defenders. John Connor from the Attorney General's office participated in prosecuting numerous death penalty cases and in doing so the local counties are charged for his time and expertise in aiding in the prosecution of such cases. Initially doubling the prosecution costs of a death penalty case to the county – the local government. Rather than just one public defender, a death penalty case requires two "death-

qualified" public defenders. Again doubling the defense attorney costs over a non death penalty case. Thus, from the beginning and just at the trial stage, a death penalty case requires four state-sponsored attorneys.

Death penalty cases are more complex procedurally. Every action by the police, prosecutors and defense counsel must be done absolutely correctly because of the high stakes involved and to assure that full constitutional requirements are met. Prosecutors must file initially a Notice of intent to seek the death sentence. This generally triggers a set of pre-trial motions. Frequently, if the death sentence is sought, it is a high profile case and involves very sensational facts. Often, then, a motion for a change of venue is filed. Generally a case is heard where the crime occurred – the witnesses, the police, the attorneys are close at hand. But, because of the sensational nature of a death penalty case, it is not uncommon to have to change venue in order to find a jury that has not been tainted by the press in the areas. This means adding costs associated with bringing in factual witnesses, perhaps even paying for the county attorney and his staff aiding him, and the judge to travel at a different spot. Or, I have seen situations where it is too expensive to remove the trial and all of the witnesses, judge, prosecutors and defense counsel to a different venue, so a jury actually has to be shipped in and given housing during the week. And this is just in deciding WHERE the trial is to take place.

Other numerous pre-trial motions are filed and fought fiercely in death penalty cases. Frequently, a question of the legality of a confession or the propriety of a search are at issue. Even if the merits of a motion may not be as strong as a defense counsel would like, in a death penalty case, defense counsel are obligated to raise almost every possible claim. Because of the high stakes and how their performance will be reviewed under a microscope later, they must file and argue all possible motions.

The cost of expert testimony in a death penalty trial is potentially astronomical. Frequently, the defendant's mental state is at issue at the trial and at least one expert hired both by the state and defense (all at the state's expense) to give expert testimony regarding whether a defendant had the capacity to have the requisite intent to commit the crime. And, while expert costs at trial are often great, they are even greater at the penalty phase of a death penalty case. At the penalty phase, the jury must consider and weigh "aggravating and mitigating" circumstances. Again, at least one expert for each side must be obtained in order for the jury to be able to fully consider the circumstances and appropriateness of actual imposition of the death penalty.

So, we know of the great added costs of having extra counsel on both sides, added costs of investigation, numerous motions filed and expert testimony. In Blaine County, in the prosecution of Lawrence Dean Jackson – prosecuted as a death penalty case, the court for defense counsel ALONE was \$311,306. And this was billed at \$60/hour. The current rate is \$120/hour, so a conservative estimate of the Blaine County prosecution now would be \$622,000 for defense costs, this can be easily doubled in prosecution time and expert testimony costs, with a total cost of \$1.2 million to prosecute such a trial.

Remember that the trial stage is only the beginning. There is an automatic appeal of a death penalty case, and then there are post-conviction proceedings that frequently look at the effectiveness of defense counsel. The cost of an appeal of a death penalty case is staggering in that it frequently lasts 20 years as in McKenzie and Dawson. We requested from the Attorney General's office an estimate of the tremendous cost of appeals of death penalty cases. I know when we were in the final months before the McKenzie execution, a literal team of attorneys from the Attorney General's office was working on the case, some filing responses in the district courts, some in the 9th Circuit, and I was preparing briefs that were lodged in the US Supreme Court in anticipation of last minute appeals. The time and effort was literally staggering. We did not keep separate records of the time spent on death penalty appeals, and I recently requested the cost and time spent on appeals from that office. John Connor replied to me and stated that although the costs and time spent had never been separately calculated, he could affirm that they take considerable time and effort.

Again these appeals to do not include one appeal to the Montana Supreme Court, but also review of those procedures in post-conviction system – they can easily accumulate to over 2,000 hours of attorney time over the course of a 10 to 20 year legal process – amounting to an additional \$240,000 in defense costs – and this does not count at least a similar amount of time spent in the attorney general's office. Assuming an appellate attorney spends a similar amount of time, the resulting costs is about another 500, 000, making the total cost of any death penalty case almost \$2 million dollars.

Execution costs themselves are expensive – setting up the lethal injection chamber, personnel expenses and overtime – for the David Dawson execution it was approximately \$45,000.

I have left out the costs of incarceration – death penalty cases frequently take up to 20 years before the execution. The cost of keeping an inmate on death row or maximum security is about \$48,000 /year – 20 years at a cost of \$1 million dollars. The cost of maintaining an inmate not in general population is about \$27,000/years, a \$20,000 less per year or a savings of \$400,000 over the 20 years.

This estimate comports with studies in other states.

Studies in other states have said that the added cost of a death penalty trial is at least 48% (a study in Tennessee) or as much as 70% (a study in Kansas). A commission appointed by the Connecticut General Assembly stated that costs of a death penalty trial were DOUBLE those of a non-death penalty trial.

Lastly, and I will close with this thought. Even if the State incurs all this added expense of a death penalty trial, the majority of cases which go on appeal after imposition of a death sentence do not result in execution because error has been found at the trial stage. In New York, after the death penalty was reinstated in 1995, the state spent an estimated \$170 million prosecuting a handful of cases. After expending all this money, only seven death sentences were handed down

in nine years, and of those, five have already been reversed on appeal. As Exhibit B on my handout shows – five of those who went through death penalty trials and appeals in Montana had to be resentenced because of plea bargaining down after either errors in the trial and sentencing phase of their cases or because of settlement.

In sum, every state that has ever undertaken a cost study of the death penalty system has found capital cases to be substantially more expensive than cases where prosecutors seek lengthy prison sentences. In terms of economics alone – cold hard numbers – it makes more sense to abolish the death penalty in favor of other sentencing options.

Thank you for your time and attention. I would be pleased to answer any questions.

EXHIBIT A
Attached to Testimony of Betsy Griffing
Senate Bill 306, Senate Judiciary, February 7, 2007
**WHY TRIAL COSTS FOR DEATH PENALTY CASES ARE MUCH GREATER THAN FOR NON DEATH-
PENALTY CASES**

STAGE	DEATH PENALTY CASE	NON-DEATH PENALTY
Pre-Trial	2 attorneys appointed, possibly 2 prosecutors. ABA standards also require a defense team that includes a mitigation specialist and an investigator.	1 attorney, 1 prosecutor.
	More motions filed for both trial and sentencing; defense likely to file any motion that may be relevant no matter how much of a long shot it is because the stakes are so high.	
	Change of venue more likely.	Change of venue unlikely.
	Sequestered jury more likely.	Sequestered jury unlikely.
	More extensive investigations by both sides, including investigation into mitigating evidence, extensive hiring of expert witnesses including psychiatrists and psychologists.	Jury will not be presented with mitigating factors.
Trial	Individual questioning of jurors regarding death penalty views.	Short jury selection.
	Two-part trial: guilt and sentencing.	One-part trial.
	Almost all capital cases will go to trial and the trial will be longer than a non-capital trial.	About 95% of non-capital cases are settled without a trial through plea bargain.
	Sentencing involves a second trial with witnesses and experts before a jury.	Sentencing is brief, based on guidelines, made by the judge.
Post-Trial	Three levels of appeal, usually at taxpayer expense.	Only first level of appeal typically at taxpayer expense.
	More appealable issues: guilt and sentencing, collateral attacks on conviction and sentence are the norm.	Plea-bargained cases have few appealable issues; sentences are rarely overturned; collateral attacks are unusual.
	Sentence not carried out for about 10 years.	Sentence begins immediately.
	Higher security incarceration, similar to solitary confinement.	Typical confinement.
	No financial return from prison labor.	Prisoner can work to support himself and others and/or to provide compensation to victims' families.
	Clemency will be sought and the process can be lengthy and very political.	Clemency is rarely sought.
	68% of cases are overturned and either the whole trial or the sentencing trial must be done again.	Error rate is 15% or less.
	Less than 10% of sentences are carried out.	Hence, even in 90% of capital cases, the state will have to bear all the costs associated with life sentences, as well as most of the costs special to death sentences.
Over-all	Costs are up-front; mostly at trial level.	Costs are spread out over many years of incarceration.

EXHIBIT B
Attached to Testimony of Betsy Griffing
Senate Bill 306
Senate Judiciary
February 7, 2007

MONTANA DEATH ROW STATISTICS 1973 – 2006

Total sentenced to death:13

Executed.....3

David Thomas Dawson (8/11/06 @ 20 years on death row)

Terry Langford (02/24/98 @ 10 years on death row)

Duncan McKenzie (05/10/1995 @ 20 years on death row)

Died (Suicide)2

Rodney Sattler (02/02/2004)

Douglas Turner (07/08/2003)

Died (Non Suicide).....0

Resentenced by Courts.....5

Daniel Martin Johnson [LWOP (plea agreement)]

Bernard Fitzpatrick [300 years WOP]

Dewey Coleman [commuted to extended sentence]

Lester Kills on Top [2 consecutive life terms + 40 years WOP]

Vernon Kills on Top [2 consecutive life terms + 40 years WOP]

Sentence Commuted by Governor.....1

David Keith**

** Reasons reportedly included Keith's partial paralysis and blindness, remorse, religious conversion, and the possibility that he may have shot the victim as a reflex action. Note: Montana is a state in which the governor must have the recommendation of clemency from a board or advisory group.

Other Removals.....0

Under Sentence of Death 01/11/07.....2

William Jay Gollehon

Ronald Allen Smith

Testimony of
Gary J. Hilton, Sr.

SB 306

An Act Abolishing the Death Penalty and Replacing it with Life
Imprisonment without Possibility of Release

Senate Judiciary Committee Hearing

February 7, 2007

Good afternoon. My name is Gary Hilton, Sr. I retired from the New Jersey Department of Corrections in 1998 after 33 years of service. During my career I held positions of Warden at the New Jersey State Prison at Trenton, the Correctional Institution for Women, and on an interim basis at the Youth Correctional and Reception Center at Yardville and the East Jersey State Prison at Rahway. For a period of approximately 17 years, I served as the Department's Assistant Commissioner for Operations, Deputy Commissioner, Chief of Staff, and at the time of my retirement I had the privilege to serve as Acting Commissioner. After leaving State service I served as Director of Corrections and Youth Services for Monmouth County. Upon my retirement from public service in 2002 I formed a correctional consulting firm, Paige Plus, LLC. I am presently President of Paige Plus, and we have provided comprehensive correctional consulting and expert witness services to a variety of public and private agencies and throughout the United States. Over the

years I have lectured at various colleges and universities, and in 1995 I had the privilege to deliver a major address before a gathering of correctional executives representing former eastern block countries meeting in Budapest, Hungary.

I have a long history and familiarity with New Jersey's death penalty. While serving as Assistant Commissioner I was responsible for overseeing the development of procedures for the Capital Sentence Unit at the New Jersey State Prison at Trenton, as well as developing procedures and protocols for the implementation of the lethal injection penalty. During my tenure at the Department's Central Office I was responsible for overseeing approximately 27,000 sentenced offenders, 40,000 parolees and a staff of approximately 9,000. I believe my direct experience within the New Jersey Department of Corrections makes me well qualified to comment on life without parole as an alternative to the death penalty.

I will attempt to keep my oral presentation well

within the allotted time frame in order to allow for any questions the legislators members may wish to pose. I do, however, wish to make one preliminary comment: I never have been, nor am I today, opposed to the death penalty on the basis of a moral consideration. During an earlier period of my professional life I supported and believed that the death penalty had a proper and appropriate position in our criminal justice system. It has only been with the passing of time, first-hand observation, and careful deliberation that I have come to a clear and firm opinion that the death penalty is poor public policy and ill-advised correctional practice. I believe that any rational individual, given similar professional experience, would draw the same conclusion.

Today there are approximately a thousand or more persons serving some form of life sentence, or the practical equivalent, in the New Jersey State Prison at Trenton, which is the State's most secure maximum security institution.

The New Jersey and I would expect the Montana experience, similar to the national experience in dealing with inmates serving actual or practical forms of natural life sentences, has been that these inmates pose no significant additional challenges nor require any special resources beyond that of any other inmate classified for maximum security level confinement. A substantial body of empirical research supports the claim that persons serving life sentences are less likely than the average inmate to break prison rules, including rules prohibiting violence (see Johnson and Dorbrznska, 2005).

Maximum security prisons must always be viewed as potentially dangerous and violent environments. An unfortunate reality is that very bad things will over the course of time take place in very well-managed maximum security prisons. Confinement in a maximum security prison fundamentally differs from confinement in medium or minimum security facilities in that the maximum security prison's perimeter is always fortified

with deadly force. Inmates know with certainty that if they attempt to escape correction officers are lawfully authorized to "shoot to stop". Correction officers in a maximum security facility live with a similar reality; if they are ever positioned between an inmate bent on escape and a path to freedom, it is both likely and reasonable to assume that the inmate will do whatever is needed to effect the escape.

Within the maximum security environment the majority of inmates accede to the tight security controls, limited movement, long hours of cell confinement, and the uncompromising rules, regulations and repetitive schedule. Generally, they accept the daily routine of imprisonment in order to make what they view as the best of a bad situation. For those inmates who choose to act in a violent or disruptive manner or incite others to do so, the maximum security environment has specially structured living units to effectively control and manage these recalcitrant individuals. Close custody confinement inmates spend

approximately 22.5 hours a day in their cell. These are highly disciplined, controlling environments, as they are meant and need to be.

It is my recommendation, without any reservation, that anyone sentenced to life without parole for murder must serve the full term of their sentence in a secure penal environment. With all due respect, it is my opinion that life without parole means this: the only way an individual leaves prison confinement is in a rubber bag and with a tag on their toe. I suggest Montana legislators adjust their sentencing structure accordingly.

The only way an individual sentenced to life without parole could be released would be upon a judicial reversal of conviction or executive clemency granted by the Governor. Judicial reversals are, of course, a matter for the courts and are beyond the political process. In my experience, the political likelihood of executive clemency is granted by a Governor is remote at best and would only be considered

under the most compelling circumstances.

As difficult and overbearing as life in a maximum security prison is for the younger and middle-aged inmate, I can personally think of nothing more horrific than contemplating and enduring the process of growing old in a maximum security prison. From my own experience I know that inmates facing life without parole or the practical equivalent generally lose meaningful visiting and other contact with family and friends within the first 5 to 10 years of confinement. My personal observations have been that mothers are the most lasting source of visits and correspondence. Anyone who might suggest that life in a maximum security prison is a lark and that inmates pass the time of day in sun-drenched yard areas and immerse themselves in creative art and literary interests is simply misinformed.

By its very nature the maximum security prison environment is a cold, dangerous and frightening place. The reality is that as offender's age and becomes more

infirm they become more likely targets of abuse and intimidation by the younger population. The prison culture has no respect or deference to its senior counterparts. Older inmates are routinely strong-armed for their meager personal assets, i.e. tobacco, hard candy, coffee, et cetera. Older inmates are often required to hoard or courier contraband, i.e. weapons, drugs, fermented spirits, on behalf of younger thugs. Older inmates in fact often voluntarily agree to hoard or courier such contraband in return for protection from various prison groups or gangs. I can vividly recall observing older inmates remaining on the cell block during periods when the vast majority of other inmates had gone to recreation activities off the tier inasmuch as this was the only time the older inmates felt safe enough to utilize the gang showers. I specifically recall an older inmate once sharing a perspective of his long period of confinement at the New Jersey State Prison at Trenton. The inmate in question told me that not long after first arriving at

the prison he observed a rookie correction officer begin his career, and then some 25-plus years later observed this same correction officer retire. Within a day or two of the latter officer's retirement the inmate in question observed another rookie officer begin his career, and the inmate realized that he will still be confined, if alive, when this second rookie officer exercises his retirement benefit.

In conclusion, I genuinely believe that execution is not sound or proper public policy. In my opinion the irreversible reality of execution must be a major consideration. The ever-advancing and rapidly improving capabilities of forensic science and its potential to provide heretofore nonexistent evidential resources must be given deliberation. I am of the firm belief that the decades-long appeal process is an unnecessary and cruel protraction of grief and suffering for victims' families and loved ones. I am also of the opinion that, if use of the death penalty is ended, the replacement punishment should be life

without parole. This would in my judgment better serve the interests of society, including the victims' families.

From the standpoint of public safety, I believe that execution is not a significant deterrent. To the contrary, my experience suggests that life without parole is possibly a more meaningful deterrent.

Unfortunately, many of today's very hostile and angry youth do not expect to live long, and execution is merely one of any number of violent options associated with their perceived demise. I genuinely believe that if life without parole means life without parole, no ifs, ands or buts, and that every day of the sentence will be served in a secure penal environment, some deterrent benefit may be reasonably anticipated because this grim reality of a long and lonely life behind bars may frighten these young thugs more than an early death.

I ask that you carefully review and consider what I have had to say about both the general realities of

life in a maximum security prison and the specific realities of growing old and eventually dying in secure confinement. Upon such reflection, I am confident that you will share my conviction that true life without parole provides a real and powerful measure of retribution.

I trust my observations have been of value to you, and I welcome an opportunity to respond to your specific questions.

Gary J. Hilton

Gary J. Hilton's distinguished career in Corrections has spanned over 37 years. He is a proven leader, with strong operations and executive management skills. Mr. Hilton has served as an expert witness, trainer, lecturer and consultant to a wide range of public, judicial and private entities both nationally and abroad. He has also provided technical consultation and training services on behalf of the National Institute of Corrections.

In April of 1998, Mr. Hilton concluded a 33 year career with the New Jersey Department of Corrections having served as Warden of the State's maximum security prison, Superintendent of the Adult prison for women and for over 17 years as Assistant Commissioner for Operations, Chief of Staff and Acting Commissioner.

Prior to his retirement from public service in July 2002, Mr. Hilton was Director of Corrections and Youth Services for Monmouth County, New Jersey. During his tenure, he spearheaded the successful national accreditation of the central facility. Mr. Hilton is a charter member of the New Jersey Chapter of the American Correctional Association and currently serves as the organization's First Vice President. He has overseen more than \$850 million in facility construction and renovations. He has also been the recipient of numerous awards and commendations from various professional and governmental organizations.

Currently, Mr. Hilton is founder and president of Paige Plus LLC, a comprehensive correctional service and consulting company.

David Kaczynski

David Kaczynski is executive director of New Yorkers Against the Death Penalty (NYADP) and the brother of Theodore Kaczynski - the so-called Unabomber - who was arrested in 1996 after David and his wife Linda approached the FBI with their suspicions that Theodore might be involved in a series of bombings that caused three deaths and numerous injuries over 17 years. Despite his diagnosis of paranoid schizophrenia, Theodore was charged capitally and only avoided the death penalty after his family waged a two-year campaign to convince the US Justice Department that Theodore's delusions had precipitated his violent behavior. Under pressure from the media and advocacy groups including the National Alliance for the Mentally Ill, the Justice Department offered a plea bargain that spared Theodore's life, but it never publicly acknowledged that Theodore's mental illness was a mitigating factor.

In 1998, David and Linda received a one million dollar reward from the Justice Department for their role in the Unabom investigation, which they subsequently dedicated * minus attorney's fees and taxes - to the victims and their families. With help from the Community Foundation for the Capital Region, they set up the Unabom Survivors Fund, which distributed \$680,000 to victims of the assaults.

Prior to joining NYADP, David was assistant director of the Equinox shelter for runaway and homeless youth in Albany, where he counseled and advocated for troubled, neglected and abused youth in the Capital District. As director of NYADP and as a board member of the National Coalition to Abolish the Death Penalty, he is currently focused on a campaign to ban the death penalty for people with serious mental illnesses.

Through his life and his work, David has sought solutions to human problems through understanding and compassion as opposed to violence and coercion. His story touches on the things we must learn and the balances we must achieve to keep our sense of humanity alive through adversity and crisis.

David is currently writing a book on violence and healing with Gary Wright, who was seriously injured by one of Theodore Kaczynski's bombs in 1987.

Testimony of David Kaczynski
to the Montana State Senate Judiciary Committee

February 7, 2007

I've always been opposed to the death penalty. Although I do not believe that killing a human being is inherently immoral, I do believe that taking a human life can only be justified by necessity - self-defense, a just war, or the use of lethal force by police to stop a violent criminal. If we can protect society by incarcerating murderers, including life imprisonment without the possibility of parole, then we should not use the legal system to carry out a program of unnecessary killing.

My view is consistent with faith-based positions against capital punishment adopted by most American religious denominations. The Roman Catholic Church, for one, has articulated a clear link between its moral and practical reasons for opposing the death penalty. It teaches that the death penalty is fundamentally wrong whenever non-lethal means such as long-term incarceration are available to protect society. On his last visit to the United States, Pope John Paul II pleaded for the elimination of capital punishment, calling the death penalty "cruel and unnecessary." He expressed concern not only that it inflicts damage on the condemned person but, more importantly, that it causes moral damage to society.

Up until 1995, my views on capital punishment were purely theoretical. I never imagined that one day I'd have a personal confrontation with the capital punishment system. But that fateful day came in September of 1995 when my wife Linda suggested that my estranged older brother Ted might be the notorious "Unabomber."

At first, I simply couldn't believe that Ted was capable of harming anyone. Although I believed that Ted was disturbed - he was eventually diagnosed with schizophrenia - I'd never seen any signs of violence in him. But as Linda and I pored over the Unabomber's published Manifesto, I began to confront the reality that my brother, Ted Kaczynski, might be the Unabomber.

We soon found ourselves facing a terrible dilemma where any choice we made could easily result in someone's death. If we did nothing, Ted might kill again. On the other hand, if we handed him over to the FBI, he could be executed. I had to ask myself what it would be like to go through life with my own brother's blood on my hands.

At the time, it disturbed me greatly that the price of doing the right thing might be my brother's execution. I wanted to make a life-affirming choice, but the death penalty put me in a position where any choice I made could lead to someone's death. In order to protect innocent life, I had to potentially sacrifice the life of my mentally ill brother.

I also had to grapple with the effect of the death penalty on someone else I loved: our elderly mother Wanda. I experienced first hand what the murderer and the executioner both fail to see, that the person who is killed is usually survived by family members who suffer much, much more. I feel tremendously lucky that Ted did not get the death penalty. But I can tell you with absolute certainty that if he'd been executed, he wouldn't have been the person who suffered the greatest agony; that person would have been our mother Wanda.

Our decision to turn Ted in was based on the belief that we were morally obliged to do whatever we could to stop the violence. Ten years later, we stand by our decision. It brought an end to the Unabomber's 17-year reign of terror which left three people dead and many others injured. We probably saved lives. We'd also like to believe that we set a positive example for other families facing similar dilemmas.

Over the next two years, I witnessed first hand how the criminal justice system actually works. The US Justice Department promised to protect our privacy. Instead we were swamped with media attention on the day of Ted's arrest and for months afterwards. Personal information we shared in strict confidence with the FBI ended up in the *New York Times*. Prosecutors solemnly promised to make a "fair and impartial" evaluation of my brother's mental condition. Instead they used a notorious "hired gun" legal expert to provide psychiatric testimony in my brother's case. Fortunately, my brother will spend the rest of his life in prison. But Ted's life wasn't spared because he's any sicker than one

hundred or so seriously mentally ill people that have been executed since 1992. His life was spared because he had great lawyers.

I began to see the criminal justice system as an imperfect system run by fallible human beings. From the moment of a suspect's arrest to the condemned man's final breath, the process is influenced by so many variables and so many subjective judgments that inconsistent results are practically guaranteed. The entire judicial system presumes a level playing field, but too often justice gets lost in the shuffle. As a result, we have a death penalty that disproportionately impacts the poor, people of color, and the mentally challenged.

It's probably an empty exercise to debate whether capital punishment is ever justified. Reasonable people can disagree about this philosophical question. But no reasonable person who truly understands how the current system functions can, in my opinion, claim that it represents justice. Who lives and who dies should not depend on one's wealth, one's given mental ability, one's ethnicity or race, or anyone's personal whim or bias.

Do we really want a death penalty that is applied unfairly and risks executing the innocent? A perfect system is unattainable, but a marginally better system would operate even more slowly than the current unwieldy system, cost much more and execute fewer people. It makes far more sense, in my opinion, to devote limited public resources to effective law enforcement.

Do we want more lawyers arguing in court, or more police on the street? Do we want longer trials, or better victim services? Do we want to kill an unlucky few (not necessarily the worst), or do we want to help troubled kids before they end up hurting someone? In the real world, these are the choices we must make. These are the choices you, as members of the Judiciary Committee, face as you consider bill #306.

Linda and I made *our* choice when we turned in someone we love to the FBI. In doing so, we made a difficult yet responsible, life-affirming choice. The same deeply held ethical values now prompt me to speak against the death penalty. We made sacrifices to protect people we didn't know. In doing so, we also made a statement about the kind of world we want to leave to future generations - a world where violence is truly a last resort; a world where decency and humanity come first.

Respectfully submitted by,

David Kaczynski

David Kaczynski is Executive Director of New Yorkers Against the Death Penalty. He is the brother of convicted "Unabomber" Theodore Kaczynski. David's brother was charged capitally by the US Department of Justice after David turned him in to federal authorities, thus ending one of the longest and most expensive criminal investigations in US history.

Testimony of Ron Honberg, J.D., M.Ed
Legal Director, National Alliance for the Mentally Ill (NAMI)
Arlington, Va.

Hearing on the Death Penalty in New York
Wednesday, December 15th, 2004
New York City

Assemblyman Lentol, Assemblywoman Weinstein, Assemblyman Aubry and distinguished members of the Committees, my name is Ron Honberg and I am the Legal Director for the National Alliance for the Mentally Ill (NAMI). I am pleased to be here today on behalf of NAMI, which is the nation's leading organization advocating in behalf of people with severe mental illnesses – disorders originating in the complex biochemistry of the brain such as schizophrenia, bipolar disorder, major depression, obsessive-compulsive disorder, and severe panic disorder. NAMI has 210,000 members who are primarily people with severe mental illnesses and their families, and more than 1,200 affiliates nationwide. NAMI's New York State affiliate, NAMI-New York State has xxx members and 49 local affiliates throughout the state.

Although NAMI's primary goals are to improve treatment and services for people with severe mental illnesses, our efforts and attention have increasingly focused on the criminal justice system in recent years. Sadly, the criminal justice system has become the de-facto "mental health treatment system" in many communities, largely because psychiatric treatment and mental health services are frequently not available to those who most need them.

Most people with severe mental illnesses in criminal justice systems have been charged with minor, non-violent misdemeanors or felonies. But, some people with these illnesses, particularly those in prisons, have been convicted of more serious, violent crimes. And, in some states, people with severe mental illnesses are significantly represented among the ranks of individuals on death row.

NAMI strongly opposes the death penalty for people with severe mental illnesses. The U.S. Supreme Court and many state legislatures have eliminated the death penalty for juveniles and people with mental retardation. We believe that it is time to extend these prohibitions to people with severe mental illnesses, for the following reasons.

- 1. The symptoms and functional effects of severe mental illnesses, like mental retardation, diminish criminal culpability sufficiently to mitigate against the ultimate punishment of death.**

The principal of retribution – one of two recognized justifications for the death penalty – requires that the penalty imposed be proportional to the defendant's culpability for the crime. In accordance with this principal, the death penalty has been reserved for only the most heinous crimes – crimes of a depraved nature committed in cold blood by individuals sufficiently in command of their faculties to be held fully culpable for their

actions. Recently, the U.S. Supreme Court, in Atkins v. Virginia,¹ struck down the death penalty for defendants with mental retardation, citing characteristics of these disorders that diminish the capacity of defendants to formulate criminal intent or to carry out criminal acts in cold-blooded, calculating ways.

In Atkins, the Court recognized that while mental retardation does not excuse criminal culpability, it does justify a lesser degree of culpability, thereby eliminating the death penalty as an option. Although quite different from mental retardation, severe mental illnesses similarly impact in profoundly negative ways on perception, cognition, and behavior. Thus, NAMI believes that the rationale articulated in Atkins for exempting individuals with mental retardation from the ultimate penalty of death applies equally to individuals with severe mental illnesses.

Severe mental illnesses such as schizophrenia, bipolar disorder, and major depression are biologically-based brain disorders that produce symptoms frequently beyond the control of those who experience them. For example, individuals with schizophrenia frequently experience paranoid delusions and auditory or visual hallucinations so vivid and profound that they appear real. These individuals may be unable to distinguish between delusions and reality and may sometimes act on their delusions or behave in ways that seem bizarre or incomprehensible to others. It is not uncommon for an individual experiencing paranoid delusions to perceive that he or she is under threat, when no such threat exists.

Judges and juries, faced with the monumental task of passing judgement about the culpability of individuals who commit crimes while psychotic, are essentially asked to do the impossible. It is not possible to impose logic, as the law tries to do, on biologically based brain disorders that create illogical, confused patterns of thought. Bright line tests between right and wrong do not work when it comes to evaluating the dark, unbridled confusion of psychosis, delusions, and hallucinations.

A first person account of what it is like to be psychotic can be found in the 1989 book, Private Terror/Public Life, by James Glass.

I convinced myself several things were happening: Unrecognizable voices invaded my ears; transmitters had been planted in the ceiling; everyone on the Hall spoke about me ... spies were sent into the Hall exclusively to keep track of me and to report any suspicious behavior to the hospital administration; ... killers hid behind closed doors and waited until night to sneak into my room; food poisoned my insides and rotted out my intestines.

The experience of psychosis cannot be fully understood by those who have not experienced it first-hand. Some who experience psychosis may be driven to act in ways that they would ordinarily never act. They may literally be powerless to control their actions because their thoughts are shaped by forces beyond their control. Under such circumstances, culpability is diminished and the death penalty is disproportionate and unjust.

The second rationale for the death penalty – deterrence – also does not apply to defendants with severe mental illnesses. It is highly unlikely that the threat of the death penalty will deter individuals who believe they are under threat or that they have been ordered by God to act in a particular way. The best way to deter such crimes is through timely and ongoing mental health treatment, something that is sadly all too often not available for people with severe mental illnesses today.

2. There is mounting evidence that mental illness is construed as an aggravating rather than a mitigating factor in capital cases.

Proportionality analysis, weighing aggravating factors identified in state death penalty statutes against mitigating factors in capital cases, is designed to ensure fairness in the application of the death penalty. Unfortunately, there are growing concerns that this approach is not working in cases involving defendants with severe mental illnesses.

The laws of virtually every state include mental disease or defect (the term in New York's law is "mental or emotional disturbance at the time of the offense") as a mitigating factor to consider in capital cases. Based on this, it might be assumed that cases with evidence of severe mental illness at the time of the crime will not result in death sentences. In actual fact, it appears that evidence of severe mental illness is frequently viewed as an aggravating rather than mitigating factor in capital cases.

In an article published in 2000, Professor Christopher Slobogin, a leading expert on mental illness and the law, cited a number of studies showing this trend.ⁱⁱ For example, a study of 175 capital cases in Pennsylvania demonstrated that all aggravating and mitigating factors listed in that state's death penalty statute correlated with the eventual sentence imposed in the predictable direction, with the exception of "extreme mental or emotional disturbance", which correlated positively with a death sentence.ⁱⁱⁱ A Georgia study found a correlation between unsuccessful insanity pleas and the ultimate imposition of the death penalty.^{iv} And, Professor Slobogin cites a number of other studies yielding similar results.

Research results suggest two possible reasons for this disturbing trend. The first concerns the perceptions of lay-people that people with mental illnesses are abnormally dangerous. Thus, jurors may view a capital defendant with schizophrenia as beyond redemption – with no amount of treatment likely to reduce that person's violent tendencies. In actual fact, the opposite is true. Psychiatric treatment has been shown to be very effective in reducing risks of violence.^v

A second reason may be the cynicism of jurors that mental illnesses are real – and perceptions on the part of these jurors that raising a mental illness as a mitigating factor is a subterfuge designed to enable people to escape responsibility for their own behaviors. Research has shown that mock jurors feel far more negatively towards defendants with mental illnesses than they do towards other types of defendants.^{vi}

The confusion of jurors about severe mental illnesses may not be alleviated by expert testimony presented in the Courtroom. In fact, it may be reinforced when competing experts for the defense and prosecution present different conclusions about the nature of the defendant's mental illness and its impact on his or her behavior.

3. Serious concerns exist about whether procedural due process protections in capital cases are effective for defendants with severe mental illnesses.

The ability of a capital defendant with active symptoms of severe mental illness to receive a fair trial or otherwise participate fully and knowingly in his or her own defense is in serious question. Problems can and do arise at a number of points in the process, including:

- The ability of defense attorneys to represent individuals who may not be cooperative or fully able to participate in their own defense. Although the U.S. constitution requires that defendants must be capable of participating knowingly and fully in their own defense, competency standards are quite low and may be misunderstood and unevenly applied. And, history abounds with defendants who have been allowed to proceed to trial and even represent themselves, despite serious questions about their competency to do so. One example of this is the case of Scott Panetti, a man with a long history of paranoid schizophrenia, currently on death row in Texas. Although serious questions existed about his competency to stand trial, Panetti was allowed to fire his attorneys and represent himself. At trial, Panetti wore a cowboy outfit, constantly used old western terminology, and asked irrational questions, frequently citing biblical passages and engaging in incoherent and confused streams of consciousness. Despite this, he was convicted and sentenced to death.^{vii}
- The susceptibility of defendants with mental illnesses to coercion, e.g. false confessions, waiving their right to counsel, etc. This is a concern that was raised by the Supreme Court in Atkins, and it applies equally well to defendants with severe mental illnesses.
- The proliferation of "volunteer" cases across the country, individuals who steadfastly insist throughout the criminal process that they want to plead guilty, forego appeals, and hasten the process of execution. In my experience, the desire of these individuals to proceed with their own deaths is often symptomatic of the severity of their illnesses – this is borne out by the fact that "volunteers" frequently change their minds after they receive psychiatric treatment.

Conclusion:

The proposition that the death penalty in the U.S. should be applied, if at all, only to the most aberrant of criminals is beyond question. The diminished culpability of defendants with severe mental illnesses, the non-likelihood that the death penalty deters other such defendants, and serious questions about whether these defendants are fully able to access substantive and procedural due process protections in capital cases, strongly support the

elimination of this option for people who suffer from these biologically-based brain disorders. When it comes to death as a punishment, there should be no margin for error.

Thank you for giving me the opportunity to testify before you today.

ⁱ 536 U.S. 304; 122 S. Ct. 2242 (2002)

ⁱⁱ Christopher Slobogin, "Mental Illness and the Death Penalty", 1 California Criminal Law Review, art. 3 (2000), www.boalt.org/CCLR

ⁱⁱⁱ David Baldus, et al, "Racial Discrimination and the Death Penalty in the Post-*Furman* Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia," 83 *Cornell L. Rev.* 1638, 1688-89 (1998).

^{iv} Baldus, Id. at 640-41.

^v Steadman, HJ, et al, "Violence by People Discharged from Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods", *Archives of General Psychiatry*, 55: 393-401, 1998.

^{vi} Phoebe C. Ellsworth, et al, "The Death-Qualified Jury and the Defense of Insanity", 8 *Law and Human Behavior* 81 (1984)

^{vii} See <http://www.internationaljusticeproject.org/illnessSPanetti.cfm>

Marietta Jaeger Lane

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Wife of Robert (Permanent Deacon in the Catholic Diocese of Helena), mother of five, stepmother of four, grandmother of nine; great-grandmother of two, member of Holy Family Catholic Church, Three Forks, Montana;

Author of *The Lost Child*, Zondervan Publishing Co. (currently out of print but available through Amazon.com while re-write in progress); writer or subject of many book chapters and articles for religious, health and social justice publications, including Archbishop Desmond Tutu's book, *No Future Without Forgiveness* and Washington, DC's Catholic University's *Journal on Restorative Justice*;

Founding member and speaker for *Murder Victims Families for Human Rights (MVFHR)*, a national support group which advocates for alternatives to the death penalty, and programs and government policies which protect victim families' civil rights, reduce violent crime and promote healing for victims' families as well as for offenders and their families;

Founding Board member of, and speaker for, *Journey Of Hope.. From Violence To Healing*, a national organization of murder victims' family members, including those of the executed, and supporters, who conduct speaking tours as invited around the country, advocating forgiveness, concern and compassion as a means to healing for victims' families, as well as abolition of the death penalty;

Interviewed twice on The Vatican Radio Station as well as on programs and in print in Ireland, Sweden, Canada, Denmark, Italy, France, Japan and South Korea, also on many U.S. and local religious TV programs. Subject of interviews and documentaries presented in national and international media, some programs of which are ABC's *20/20 Program*, *Good Morning, America* and *The FBI: Untold Stories*, and on A&E and Discovery TV Channels in the U.S., and England's and Europe's BBC, Channel Four and Discovery Channels.

Presenter to The United Nations Commission on Human Rights' re the issue of capital punishment during their April '99 meeting in Geneva, Switzerland;

Testimony of
Marietta Jaeger Lane
On Behalf of
Murder Victims' Families for Human Rights
&
Journey of Hope

SB 306

An Act Abolishing the Death Penalty and Replacing it with Life Imprisonment without Possibility of Release

Senate Judiciary Committee Hearing

February 7, 2007

I am Marietta Jaeger Lane, formerly of Michigan, now living in Three Forks, Montana, for eight years.

While my family and I were camped at the Missouri River Headwaters Park here in Montana thirty-four years ago, my seven-year-old daughter, Susie, was kidnapped from our tent during the night. Fifteen months later, the FBI identified and arrested a local man responsible for my child's disappearance. Concrete evidence proved her life had been taken. Though the death penalty was applicable in this case, at my request the County Prosecutor offered the alternative sentence, in capital cases, of mandatory life imprisonment without parole. *Only then*, did the young man admit to the rape, strangulation death and dismemberment of my child as well as the deaths of a young woman and two young boys in the same area, but at different times. There was evidence that this man had caused more children's deaths around the state, but the County Prosecutors in *those* instances were insisting on the death penalty. The young man would *only* confess to the deaths that occurred in Gallatin County, *where he was being offered life imprisonment*. Clearly, **Montana's death penalty had no deterrent value in all those deaths, except to deter confession of guilt.**

I honestly and readily admit that, initially, I ran the gamut of outraged reaction. I wanted to kill the kidnapper with my bare hands. However, I am a Catholic-Christian who has learned to look to the non-violent and life-giving, final Word of God enfleshed in Scripture – Jesus – for God's idea of justice – healing and restoration. Also, my knowledge of psychological well-being asserted that hate was not healthy -- spiritually, emotionally or physically. Though I struggled with rage and revenge, I became convinced and committed to my best and most healing, freeing option of forgiveness.

Victim's families have every right to the normal, valid, human response of rage. However, to legislate that gut-level desire for blood-thirsty revenge has the same deleterious effect on the community as it does on individuals. In all the years since, that I've been working with murder victims' families, I consistently see that those who have realized their revenge in the form of execution find that *they are still left empty, unsatisfied and unhealed afterwards. They have been victimized again*, this time by the "system" they sought to give them "justice". Capital punishment does not bring healing and closure to the victim's family; instead *it desperately disappoints the families and it degrades, dehumanizes and debilitates us as a society*. The capacity for concern and compassion is what sets us apart from the rest of creation. Our laws should call us to higher moral principles than the practice of primitive acts of more killings to resolve our conflicts, hatreds, fears and frustrations. **We violate and demean our own honor and dignity by taking on the same mindset as the person who caused our grief, by killing a restrained, defenseless person, however deserving of death we deem that person to be.**

Concerning the claim of "justice for the victims' family", there is no number of retaliatory deaths which will compensate to me the inestimable value of my daughter's life, nor would they restore her to my arms. **In truth, to claim that the execution of any offender will be "just retribution" is to insult the immeasurable and irreplaceable worth of the victim. For the state to kill in retaliation for my daughter's death is to violate and profane the goodness, sweetness and beauty of her life.**

J.A. "Ziggy" Ziegler

J.A. "Ziggy" Ziegler, a retired Yellowstone County Commissioner, has been married to his wife, Stella, for fifty years. They have five children and, to his delight, ten grandchildren. Currently Ziggy is co-owner of Stella's Bakery/Restaurant with his wife.

He has been a member of St. Patrick's Co-Cathedral in Billings for 33 years and has served his parish as a Eucharist Minister and Lector. Ziggy serves as president of the Montana Catholic Conference Board of Directors and as vice-president of the Catholic Social Services of Montana Board of Directors.

He has been involved in prison/jail ministry for 28 years and is a member of the Montana Women's Prison Screening Board.

Ziggy has been a member of several other boards including the State Foster Care Review Board, the Salvation Army Advisory Board, the Child and Family Intervention Board and has served as a Downtown Billings Ambassador.

Testimony of
J.A. "Ziggy" Ziegler

SB 306

An Act Abolishing the Death Penalty and Replacing it with Life Imprisonment without
Possibility of Release

Senate Judiciary Committee Hearing

February 7, 2007

My name is J.A. "Ziggy" Ziegler of Billings, Montana. I am a retired Yellowstone County Commissioner, and I am presently Chairman of the Montana Catholic Conference.

I am the victim of a violent crime. My 78-year-old father was senselessly murdered in a foiled robbery attempt as he sat in his automobile reading his newspaper. He was mortally wounded and left to die as the perpetrators fled to a waiting car. My 76-year-old mother finished her grocery shopping, returned to the parking lot to find an ambulance removing my father's body from the car. This occurred in the neighborhood where I grew up as a child. My father was one of five homicides that evening out of the same police station. Two 16-year-old youths were apprehended in an hour thanks to the identification by a lady shopper and her 14-year-old son who were exiting the store and witnessed the crime.

There are no words adequate to describe the emotions and trauma when one receives the nerve shattering telephone call. There is at first disbelief, then sheer physical emotion of loss, then hatred, then reality. I spent the day with my father three days earlier, and now it was evident that I would never see him again. I became angry when I realized that I would never be able to say, "I love you" or "goodbye." My older brother lived near my parents and he was the first to receive the news. He called and could not get the words out other than, "Dad was gone, Dad was gone." He could not say he was "dead" or "murdered." I lived 200 miles away and thanks to a friend with a private plane I was with my mother in a matter of hours. My older sister, a mother of 12, lived in another state which took her some time to get her arrangements completed.

My brother could not come to grips with the situation. I assumed the task of identifying my father at the morgue, securing his personal belongings and making the arrangements for his release to the funeral home.

In the weeks that followed I accompanied my mother to Juvenile Hall to experience the inquest, hearing, and trial regarding my father's death. I attempted to be my mother's

spokesperson to alleviate her having to look at the photos of her dead husband, to look at the defendants and to hear their testimony. The sentencing phase followed. The two minors were remanded to the Juvenile Authorities and sentenced to a juvenile detention facility until age 21. At that time, California had no law regarding minors in capital cases.

The shock and trauma of this tragic event in our family has lingered on for a long time. My mother survived 14 years, never fully recovering from the reality of losing her husband by relying on prescribed medications to help her cope. My older brother has not forgiven the youths and has commented over the years that we should have gotten a gun and killed the two boys. My response to that has always been that it would not accomplish anything and certainly not bring back our dear father. My sister returned to her home and the chores of raising 12 children and immersed herself in that endeavor, mostly wanting to put this behind her and not speak about it.

I addressed the hate issue for awhile. It was through the gift of my faith, my family and my friends that I was able to overcome that consumption and turn it over before it totally destroyed my life and that of my family.

In 1978, I was asked to participate in a prison retreat program held at Montana State Prison, a four-day seminar with the inmates. My initial reaction was an adamant, "NO." Why do I want to go to a prison with all those criminals? I went, went again, and went again and soon became consumed with compassion when I realized that each opportunity I had to share my testimony with those in confinement affected some who were guilty of a similar crime. Many have never witnessed a victim let alone heard the discourse of what happens to a victim's family or the true consequences of their actions. Some have apologized to me, perhaps for the first time realizing what they have done to others.

Again because of my faith, my family and my friends, I am able to find peace regarding my father's demise. I have forgiven those guilty of taking my father's life. I am able to

forgive those who may be guilty of a similar crime. Hopefully, I may be that instrument that helps them realize they are forgiven. You can forgive the sinner but not the sin....

Nothing yesterday, today, or tomorrow will bring my father back; and I have accepted that. Taking the lives of the two youth that murdered my father would satisfy nothing and will only promulgate the "Eye for an Eye" theory. Those who may advocate, "I want them to be held accountable for their actions," then hold them accountable with a sentence of life in prison – no pleadings, no hearings, no extensions.

Everyday, I wear my father's wedding ring and will remain wearing it until my time comes. I have many fond memories of him knowing that he lived life to the fullest and that by his death he would not want vengeance for those that caused him harm.

So now, 29 years later, my journeys to the jails and prisons continue to give me hope that by my presence and my testimony that I may have some influence with those less fortunate than I and let them know that they are worth something because "GOD DON'T MAKE NO JUNK."

I would ask you to consider joining me at one of our four-day retreats. We stay at the prison, eat with inmates and interact one-on-one with them. You will quickly become aware of how fortunate we all are to be where we are in our life's journey. We are all called to serve... Won't you join me? Won't you join this effort to abolish, once and for all, the death penalty in Montana? I am not a man of letters. I have no degrees to strengthen my beliefs. The death penalty is NOT a deterrent to crime. I have asked this question of hundreds of inmates I have counseled with over the years. It has confirmed my suspicions. In committing a capital crime, one rarely thinks of DEATH to stop their actions. It is time to end this injustice. THANK YOU.

RONALD F. WATERMAN

Education: University of Montana, Missoula, Montana
B.A. 1966
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Clerkship: Law Clerk to Honorable W. J. Jameson,
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Partner (1972-present)
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Admitted United States Supreme Court - 1976
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United States District Court,
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Montana Bar - 1969

Professional:

Rating: Martindale-Hubbell - AV
The Best Lawyers in America - 1991-present

Organizations:

Legal: American Law Institute (1975 - present)
--Principles of Family Law, Consultant;
--Principles of Suretyship, Consultant;
--Restatement of Law Third, Torts;
--Product Liability, Consultant
United States Court of Appeals, Ninth Circuit
--Lawyer Representative (1991-1994)
--Chair (1993-1994)
American Bar Association (1969-present)
--State Membership Chairman 1973-1977
Fellow, American Bar Foundation (1976-present)
State Chair (1987-1996)
--Life Fellow (1986-present)
United States District Court
--Gender Equity Committee (1992-1994)

American Academy of Appellate Lawyers
(1994-present)

American Judicature Society
Board Member (1979-1983)

State Bar of Montana (1969-present)

Model Penal Code

Community:

United Way of Lewis & Clark County
(1974 - present)

UM Law School Board of Visitors
(1988-2005)

St. Paul's United Methodist Church

--Administrative Board (1985-1987)

--Chair, Council of Ministries (1989-1991)

Grand Street Theatre Board (1986 - 1997)

--President (1991-92)

Center for Adolescent Development

--Board of Directors (1990-1994)

--President (1992-1994)

Florence Crittenton Board of Directors
(1985-present)

National Crittenton Foundation
(2004-present)

Publications:

Product Liability, Montana Chapter

50 State Handbook,

West Publishing, 1994

Public Construction Contracting

in the Fifty States, Montana Chapter,

Wiley Publishing, 1995

Testimony in Support of SB 306
ABOLITION OF DEATH PENALTY IN MONTANA

Members of the Senate Judiciary Committee

I am Ronald F. Waterman, an attorney in private practice in Helena, Montana. I submit this testimony in support of SB 306 which would abolish the Death Penalty in Montana.

I was one of the attorneys who represented Duncan McKenzie during his appeals from his death sentence. I conducted the hearing on the clemency petition Mr. McKenzie submitted to former Governor Racicot immediately before his execution. I was with Mr. McKenzie at the time of his execution.

Additionally, during the summer of 2006, I was the lead attorney for the ACLU challenging the lethal injection protocol which was administered in the execution death of David Dawson. As we undertook that challenge, we found that the same protocol had been challenged in a number of other states, including Arkansas, California, Delaware, Missouri, Ohio, Tennessee, as well as the District of Columbia. One of these cases from the U.S. District Court in California ultimately concluded after an extensive hearing, that administration of the lethal injection protocol was barred by the Eighth Amendment because it was both cruel and unusual punishment and likely to result in the intentional infliction of pain and suffering through the administration of the drugs which consist of the lethal injection protocol. This case is now on appeal to the Ninth Circuit. Additionally two other states have suspended lethal injections due to botched executions; and one state, New Jersey, has completed a study which recommends abolishing the death penalty.

Had the parties who presented this challenge been able to convince a court that they had a sufficient interest in the subject of the litigation to be directly impacted by its outcome, I am convinced that a court, most likely the U.S. District Court for Montana, would have also held that the lethal injection protocol followed in Montana was unconstitutional.

Judge Molloy said during the proceeding in that case: "I think there is significant merit to the problems with the death penalty protocol." A
the Court commented:

"I'm very troubled by the protocol and by the cases that have interpreted and stopped implementation of a death penalty using similar protocols. I am troubled deeply, by the death warrant in this case and looking at it and the statute. And there's no question Judge Todd followed the statute. But when I read the statute, the protocol goes beyond the statute... And if the protocol exceeds the bounds of the law, then you truly do, it seems to me, have a potential homicide."

Judge Molloy further indicated his belief that likely a claimant would succeed on a challenge to Montana's death penalty protocol, observing:

"Of course, if there was a hearing where a State District Judge or a Federal Judge was authorized by the normal process of hearing both sides, with all of the evidence, then I think there could be a determination as to whether or not the Montana statute, as written, is unduly vague, or whether or not executions that go beyond the specific authorizations of the statute, are, in fact, legal executions, and then the protocol that is involved with the current execution protocol, whether or not that, in fact, violates the Eighth Amendment to the United States Constitution.

And of course, those questions are unanswered."

This Legislative body must understand that the last execution of an inmate in Montana was solely the result of the fact that David Dawson was a volunteer -- that is, he chose to stop all challenges to his execution. So, in Montana, we have witnessed an inmate dying because the State was willing to participate in a state-assisted suicide. This body must also understand that the last execution was likely the last execution which Montana will conduct. Either the California case will be affirmed by the Ninth Circuit, which is likely, in which case, Montana will be barred from undertaking any further executions, or a challenge will be mounted against the protocol in Montana and it will succeed. Additionally it is potentially possible that the U.S. Supreme Court will strike the protocol should the right case reach the Court.

I support SB 306. It is time to abolish the death penalty in Montana. The penalty is cruel and unusual punishment and should be banned as being in violation of the Eighth Amendment to the United States Constitution. Presently

the death penalty is disproportionately applied to minority members of our society and is applied in a random and capricious manner, with virtually no predictability. The exercise of the death penalty is riddled with mistakes, leading to the sentencing and potential executions of innocent individuals or individuals who should not be subjected to this severe a sentence. It is estimated that over 75% of all death sentences are subject to some flaw, either in the guilt phase or in the penalty phase of the proceeding. An examination of the death sentence in Montana reveals that the death sentence has been improperly imposed at least 68% of the time. On at least four occasions, courts have set aside death sentences and directed that the inmate be resentenced to a lesser sentence. Other death sentences have also been set aside due to errors committed in the sentencing process.

Several years ago, during a conference on the death penalty, former Governor Racicot correctly commented that the only justification for the death penalty was if this sentence deterred other capital crimes. While Governor Racicot offered his personal view that the death penalty did deter crime, his view is not shared by any criminologist or other individual who has studied this issue. There simply is no research which supports the conclusion that the death penalty deters crime.

There are several reasons for this conclusion. The first, noted above, is that most people believe that the death penalty is flawed and frequently results in an erroneous sentence. This belief dispels any deterrent effect of the death sentence.

Second, the death penalty is simply too random in its application to deter crime. It is too easy for any individual to quickly become convinced that the death penalty will not be applied to their act, regardless of the severity of the crime. For years, my legal work took me to Montana State Prison at Deer Lodge on a number of occasions. Most of the time when I was at the prison, I was on the high-security side and I spent a considerable amount of time in the Maximum Security Unit. If I could take committee members to the prison, I could identify individuals in the prison population, who committed crimes of a similar and in some instances, an identical nature of the crimes which resulted in a death sentence imposed upon only a few individuals at prison. A death penalty sentence is simply too randomly applied to result in any deterrence.

Third, even with the actions of Congress which have eliminated successive

and repetitive appeals of death sentences, the amount of time between the commission of a capital crime and the carrying out of a death sentence, results in a lack of deterrent effect of any such sentence.

Finally, the death sentence does not deter due to the nature of the underlying capital offense itself. There are a number of reasons why people kill. None, however, warrant society deliberately taking an individual's life.

Earlier I alluded to the fact that the death penalty in Montana is not likely to ever be carried out again. This fact, however, only underscores the need to abolish the death penalty now. For while it may be correct that the State will never carry out a death sentence again, this does not mean that a county prosecutor may nevertheless seek a death penalty in a case. Whenever the death penalty is sought, the criminal justice system must respond appropriately, with the appointment of death qualified counsel and numerous experts, all of whom will cost the State considerably. A death case is a case in which the expenses are all front end loaded -- of the more than a million dollars which will be spent on a death penalty case, most of the money, at least \$400,000 and perhaps as much as \$750,000, will be spent during the trial and penalty phase of the case. The potential waste of this amount of taxpayer money can be avoided only if the option of seeking the death penalty is removed totally from the prosecutor's options.

Criminals typically do not commit a capital crime through planning and stealth. The typical capital crime does not involve any cost-benefit analysis, weighing the crime and its potential punishment, on one hand, and the crime and its potential benefits on the other. Rather, most capital crimes are the result of a combination of factors, none of which are affected by the potential of a capital sentence.

Individuals who commit capital crimes, like virtually all criminals, are socially disabled or socially deficient individuals. These individuals are incapable of forming close bonds or friendships with others, they are incapable of empathy, and incapable of projecting that their actions could cause harm or injury to another. Usually this social disconnect is the result of early childhood sexual and physical abuse. About 80% of all inmates have a history of early childhood abuse -- the percentage is higher among capital crime inmates. Recent studies point to the conclusion this social disconnect is most extreme in the capital offender.

Additionally, capital crimes are not planned crimes but usually are the result of an unexpected escalation of poorly thought out lesser crimes, typically a robbery or burglary gone sour, with events cascading out of control. Capital crimes are the result of the easy availability of firearms. Capital crimes usually involve drug or alcohol use -- not that the perpetrators are intoxicated or high, only that the individuals have used substances sufficiently to wipe away any normal inhibitions which would otherwise form a boundary against such conduct.

Thus, the only justification for the exercise of capital punishment, that carrying out such a sentence will deter other capital crime, simply does not exist.

Earlier I commented that capital punishment is randomly exercised. However, as to those under a capital sentence, there are a cluster of unfortunate statistics, which all underscore the basic unfairness of this sentence.

1. The individuals who are sentenced are usually strangers to the community where the crime occurred.
2. The individuals are poor -- virtually all have been represented by appointed counsel -- usually under-experienced, underpaid and without adequate resources for investigation and expert testimony include penalty phase representation.
3. The individuals have been subject to early childhood abuse -- often sexual abuse.
4. The individuals have experienced some type of significant head trauma -- or have a mental capacity at or below normal -- a recent study showed an identifiable head injury in virtually every capital defendant.
5. The individuals have been the focus of some law enforcement officer who pushed to make the case a capital offense.
6. The individual is a member of a racial minority. At one time in Montana, we had one Afro-American out of four capital defendants at a time when Afro-Americans represented less than 1% of Montana's population. For a time Montana had 2 out of 8 death sentence defendants who were native American

when the native American population was 5% of the total population.

These disturbing statistics underscore the conclusion that in America and in Montana, we execute the poor, the slow, the strangers and the racial minorities.

Finally, at a time when this Legislature is looking for sources of revenue to fund schools, to develop the economy and to attend to the needs of the elderly and the mentally ill, continuing to apply the death penalty wastes the limited resources of the state. Every capital case requires the dedication of substantial state resources from the commencement of the prosecution, throughout the criminal justice trial and appellate reviews, through to the execution. Looking at the entire justice and correctional system costs, every capital case requires the consumption of hundreds of thousands and at times, over a million dollars. While a person could assert that there are some savings, comparing the cost of housing an individual for a full life sentence as compared with the shorter period of incarceration until an execution is carried out, such an assertion can only be made if one first ignores all of the criminal justice system expense consumed during the trial and appellate phases of a capital case.

Society should not and Montana should not merely retain the death penalty simply to retaliate against an individual who has taken the life of another. Presently as our state seeks revenge, we cheapen all human life.

It is time to abolish the death penalty in Montana.

Testimony of
The Reverend Dr. Brady J. Vardemann
on Behalf of
The Montana Association of Churches

SB 306:
*An Act Abolishing the Death Penalty and
Replacing It with Life Imprisonment without
Possibility of Release*

Senate Judiciary Committee Hearing
07 February 2007

Senate Judiciary Committee Hearing

07 February 2007

SB 306: An Act Abolishing the Death Penalty in Montana and Replacing It with Life imprisonment Without Possibility of Release

Testimony of The Reverend Dr. Brady Vardemann

Executive Director, Montana Association of Churches

Senator Laslovich and Members of the Committee:

For the record, my name is the Reverend Brady Vardemann, and I am here today to speak on behalf of the Montana Association of Churches with regard to MAC's long held and emphatic position on the issue of capital punishment.

For those of you who may not be familiar with the Montana Association of Churches, I would invite your exploration of this ecumenical organization [that is] comprised of 10 denominational judicatories representing several hundred mainline Christian churches in Montana and the many thousands of faith-filled people who are members of those congregations.

The people of MAC understand that a major responsibility of our role as followers of Christ is to be about doing our part to help establish peace in the world. We believe in the sanctity of life and the oneness of all humanity that God envisions for us. We believe that all persons carry within themselves a measure of the light of God.

In a world torn by violence and discord, MAC seeks to be a healing presence in our communities by creating safe places for civil dialogue and mutual respect in public discourse.

Through its various advocacy initiatives, MAC seeks to bring the message of the Gospel to those places where peace and justice are absent by speaking up for those among us who have been denied a voice and by working for the rights and dignity of all people.

For over 25 years, the Montana Association of Churches has declared its strong opposition to state sanctioned killing and has called upon our Governor and our elected representatives to abolish the death penalty in this state.

MAC objects to the state sanctioned killing of human beings for a number of reasons (some of which already have been heard here today).

It does not remove the causes of misery and suffering in our society.

It does not reduce the incidence of homicide in our communities.

Over and over again, we have seen how it has been applied unfairly across the spectrum of geography, race and economics.

It is far more expensive than the sentence of life without the possibility of release.

It tends to produce the very brutality which it seeks to prevent, even as it creates ever more victims: the families and loved ones of those who have committed murder.

It undermines the opportunity for murder victims' families and loved ones to move through the necessary stages of grief in a way that opens the door to forgiveness, healing and reconciliation.

It diminishes and degrades the humanity of all persons involved in carrying out the sentence of death, even as it leads to a gradual execution of the soul.

It denies a condemned person the opportunity for reconciliation and restoration of relationship – and for the life-transforming possibility for redemption, which we hold to be ultimately the work of Almighty God – *not* the appropriate function of the state.

And we must never forget that execution bears the awful and irrevocable possibility that an innocent person may be condemned to death.

The Montana Association of Churches urges your support and passage of SB 306. Thank you.

Brady Vardemann: A Brief Biography

The Reverend Dr. Brady J. Vardemann entered ordained ministry as a second career, having spent the majority of her professional life in various colleges and other academic settings where she held positions ranging "from professor to provost." After completion of her seminary studies in 1999, she was ordained a priest in the Episcopal Diocese of Montana. Following her ordination, Brady served as Dean of the Diocesan School of Theology and Canon to the Bishop of Montana for six years. In September 2005, she was appointed Executive Director of the Montana Association of Churches, an organization comprised of ten denominational judicatories representing several hundred mainline Christian churches in Montana and the many thousands of faith-filled persons who are members of those congregations. She holds a *Master of Divinity* (University of Emmanuel & St. Chad College), a *Master of Education* (University of Kansas), and a *Doctor of Philosophy in Higher Education Administration* (Baylor University). For a number of years, Brady was a professor of psychiatric nursing in colleges in Texas, Kansas and Georgia. She moved to Helena in 1987 with her appointment as Associate Commissioner of Higher Education for the Montana University System, a position she held for seven years. In addition to current her work with the Montana Association of Churches, she serves on the Board of Directors of St. Peter's Community Hospital in Helena and as a consultant to the Northern Rockies Clinical Pastoral Education Center in Billings. She is a priest associate at St. Peter's Cathedral.

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TESTIMONY OF

Justice John C. Sheehy (Rtd.)

As A Citizen Proponent

SB 306

**An Act Abolishing the Death Penalty and Replacing it with Life Imprisonment
Without Possibility of Release**

SENATE JUDICIARY COMMITTEE HEARING

FEBRUARY 7, 2007

Justice John C. Sheehy (Rtd.)
825 North Rodney Street
Helena, Mont. 59601
(406) 443-1398

Submitted at Committee Hearing
February 7, 2007

Testimony of John C. Sheehy as a proponent of and in support of Senate Bill 306, An Act Abolishing the Death Penalty and Replacing it with Life Imprisonment Without Possibility of Release.

HONORABLE SENATORS, Members of the Senate Judiciary Committee:

I am John C. Sheehy, a native of Butte and a resident of Helena, duly admitted to the practice of law in all the courts of Montana. It has been my honor to serve in all branches of state government, as a chief deputy insurance commissioner, as a state representative and a state senator, and as a justice on the Montana Supreme Court. My private trial practice of criminal and civil cases was chiefly in Billings for 30 years.

I rise and stand in support of Senate Bill 306 because it has the effect of abolishing the death penalty in criminal cases, to which punishment I am unalterably opposed. Mine is a learned opinion, in the sense that it was learned from close observation over a long period of the adverse workings and effects of the death penalty on the justice system.

I did not start that way. Early on in my court career, I wrote or participated in two cases approving the penalty of death. One defendant was eventually executed, the other was not, saved by a later appeal process. However in other cases, it seemed to me that the prosecutors were sometimes over-reaching, that some judges were posturing, that deals were often made where some defendants were sentenced to death while their co-defendants were treated much less severely for the same offense. Ever present was the dismaying thought that if we were wrong or wrongly led in assessing death, the result to the defendant was irrevocable.

I came eventually to the point where I announced that I would dissent in death cases from any further approval of a death penalty. I was vindicated at least once, in a case where two young men were given the death penalty over my dissent, based on the testimony against them from an accomplice, who received a jail sentence. Their death penalties were later reduced to life sentences by a federal court where apparently it developed the accomplice had engaged in obnoxious relations with her jailer while awaiting district court trial, unknown to the defense attorneys.

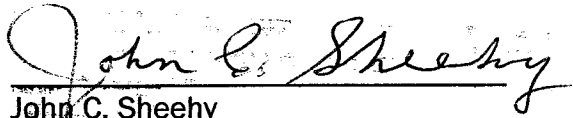
Now I want to say to the honorable Senators of the committee what I would say to you if I were visiting with each of you personally. Because I have been a legislator too, I appreciate and understand the pressure you may be under not to support this bill. Your constituents are pounded daily with lurid descriptions of homicides, and with

sound bytes formed to get high ratings in readership or listeners. Unfortunately, the public sentiment crosses over from a sense of punishment to revenge. It is very difficult for a legislator, a judge, or a juror to put aside this pressure when dealing with the issue of the death penalty.

When you serve as you do in the top echelon of state government, you are shouldered with the duty to view dispassionately how best the state will be served in decisions you make for the good of all. In many of the United States, in fact throughout the civilized world, the death penalty has been rejected as a punishment too excessive in any justice system. No one can point out any adverse effect in those states or countries from such rejection.

Senate Bill 306 would substitute for the death penalty life imprisonment with no possibility of release. Such a result would protect society from the criminal, be a just retribution for a homicide because it demands a lifetime surrender of his individual liberty, and yet would respect the accused's right to life, however ill he may have used his life.

I think it takes political courage in present-day Montana to vote to abolish the death penalty, and I applaud Senator Dan Harrington for sponsoring the bill. He has shown over a long legislative career that doing the right thing as a legislator not only is good for the state, but is good politics too. That is another reason for you to support this bill.


John C. Sheehy



The University of Montana

School of Law
Missoula, Montana 59812
(406) 243-4823

February 5, 2007

Sen. Jesse Laslovich
Chair, Senate Judiciary Committee
Capitol Station
Helena, Montana 59620

Re: SB 306, A Bill to Abolish the Death Penalty

Dear Senator Laslovich:

My name is Jeffrey Renz. I teach criminal law litigation and civil rights litigation at The University of Montana School of Law. My students who decide to practice criminal law upon graduation have become prosecutors and defense attorneys in about equal measure.

I have represented defendants in death penalty cases. My former client, David Dawson, was executed in September 2006.

I am currently drafting two essays entitled, "Redemption and Punishment" and "Redemption and Capital Punishment." In March, I will participate in a panel entitled, "The Death Penalty: History, Philosophy, and Practice," at Georgetown University. What follows is a condensation of "Redemption and Capital Punishment" and my Georgetown presentation.

My thesis is this: The death penalty denies an offender the opportunity for repentance and redemption. We all understand repentance. By repentance I mean contrition and absolution. By redemption, I mean those of the offender's actions and obligations that follow repentance and that are necessary to expiate—to provide satisfaction to God for—one's sin.¹

The Gospels are filled with messages of repentance and redemption. We are told, for

¹"By this a man is entirely freed from the guilt of punishment when he pays the penalty which is owed; further the weakness of the natural good is cured when a man abstains from bad things and accustoms himself to good ones: by subjecting his spirit to God in prayer, or by taming his flesh by fasting to make it subject to the spirit, and in external things by uniting himself by giving alms to the neighbors from whom his fault had separated him." Thomas Aquinas, Summa Contra Gentiles, Book Four, Ch. 72:14.

Sam Millsap

Sam Millsap received his undergraduate and legal education at the University of Texas and has practiced law in San Antonio, Texas, for more than 30 years. Millsap was elected Bexar County District Attorney in 1982 and served in that office until 1987. He was selected as San Antonio's "Politician of the Year" by both of San Antonio's major daily newspapers in 1983.

As District Attorney, Millsap successfully prosecuted Ruben Cantu for capital murder; Cantu was executed in 1992. In December, 2005, as a result of investigative reporting by the Houston Chronicle, serious questions were raised concerning Cantu's guilt. Millsap, acknowledging that Cantu may very well have been innocent of the crime for which he was executed, has assumed personal responsibility for his execution.

In addition to many other awards, Millsap received the Texas Coalition to Abolish the Death Penalty's "Courage Award" in February, 2006.

Testimony of

Sam Millsap

SB 306

An Act Abolishing the Death Penalty and Replacing it with Life Imprisonment
without Possibility of Release

Montana State Senate Judiciary Committee Hearing

February 7, 2007

I'm Sam Millsap and I come to you from the state of Texas, where we execute folks like its going out of style. I'm no wild-eyed, pointy-headed liberal; I am the former elected District Attorney from San Antonio, Texas, the 8th largest city in America. As Bexar County District Attorney, I oversaw the successful prosecution of several capital murder cases, each of which resulted in the execution of the defendant. I have been a strong supporter of the death penalty throughout my adult life. Last year, a major Texas newspaper established to my satisfaction that one of my prosecutions may have resulted in the execution of an innocent man.

I believe prosecutors whose best efforts may have produced unfortunate results in capital murder cases have a moral duty to publicly acknowledge and accept responsibility for their mistakes. I fervently hope that there are only a few prosecutors and former prosecutors in America today who find themselves, as I do, in the position of having to admit an error in judgment that may have led to the execution of an innocent man. I'm here today to discuss the death penalty from the perspective of a former prosecutor who is responsible for prosecution and execution of a man who may well have been innocent.

Although it is crucial that we be willing and able to look back and correct the errors of the past, as Montana has done in the non capital convictions of Chester Bauer, Jimmy Ray Bromgard, and Paul Kordonowy, it is more important that we look to the future in the search for a system that guarantees--in capital murder cases--the protection of the innocent.

As is the case in Texas, the criminal justice system in Montana, on its best day, is driven by very dedicated, but imperfect, human beings and, try as we do to get it right, sometimes we simply don't. Our courts and juries determine guilt or innocence based on testimony from witnesses who are sometimes wrong and who don't always tell the truth.

It is against this backdrop--what our states have in common--that I address the issue of innocence in the context of the case of Ruben Cantu, who was prosecuted by my office in 1985 and executed in 1993.

Because Ruben Cantu didn't receive just a fair trial--but arguably received a perfect trial--its facts are both instructive and haunting for every state that permits the death penalty.

Ruben Cantu had a fine defense lawyer, an ethical prosecutor, a fair judge, and a jury that returned the only possible verdict, based on the evidence that was presented. And yet, it has been determined 21 years later that he may well have been innocent. Whether he was innocent or not, the system failed him.

You are entitled to wonder how I can argue that the system failed in a case in which it is unclear whether the defendant was, in fact, innocent. In Texas, like Montana, prosecutors have vast discretion in deciding whether and how to prosecute capital murder cases.

I made an error in judgment by permitting Cantu to be prosecuted for capital murder based on the uncorroborated testimony of one eyewitness. Most prosecutors in America, confronted with the same circumstance at that time, would have made the same decision I made. That eyewitness, who had absolutely nothing to gain but trouble for doing so, has recently recanted his sworn trial testimony under circumstances that make his current claim credible.

One might argue that my mistake can be remedied by requiring more than the testimony of a single eyewitness in death penalty cases. That would be a good decision, but it would ignore the fact that prosecutors acting entirely in good faith make all sorts of judgments in murder cases and, because they are human, sometimes make mistakes. Add to that undeniable fact, the reality that judges, jurors, defense attorneys, and witnesses also make mistakes and what you end up with is a system that, by definition, cannot be relied on to protect the innocent in all cases.

The system we rely on to decide who may live and who must die is broken and, because it is driven by decisions that are made by human beings, can't be fixed. What we have seen over and over again are situations in which witnesses who have nothing but trouble to gain by recanting sworn trial testimony nevertheless do so and for good reasons. We have seen junk science debunked, and the exposure of terrible mistakes by forensic laboratories. And finally, we have seen misconduct and errors by many players within the system. In short, the undeniable fact is that the system we rely on in this country to prosecute capital crimes simply cannot be trusted to protect the innocent.

Some suggest that it's good enough if we get it right most of the time. That good intentions and strong procedural safeguards like you have here in Montana are sufficient. If you believe, as I do, that we **MUST ALWAYS GET IT RIGHT** in capital murder cases, that the system **MUST** do what is intended—guarantee the protection of the innocent--accepting a system that tries hard and gets it right most of the time is simply not good enough when the sanction is so final.

Death penalty supporters argue that there is no proof that an innocent person has ever been executed in the United States. United States Supreme Court Justice Antonin Scalia recently said in his concurring opinion in *Kansas v. Marsh* that he knew of no innocent man who had been executed.

I would challenge Justice Scalia and anyone else who is tempted to argue that there is no proof that an innocent person has ever been executed in the United States to make that argument after they have examined the record from Texas.

Consider first the clearest of the recent Texas cases and tell me that the criminal justice system protects the innocent. Cameron Willingham was convicted of arson and executed; his three children were killed in the fire that burned his house to the ground. His conviction was based on expert testimony that was generally considered at the time to be reliable. What we now know with certainty—too late for Willingham—is that what we accepted as expert testimony at the time was nothing more than junk science; it is now clear that the expert testimony upon which his conviction was based was flawed and that, in fact, the State of Texas convicted and executed not only an innocent man; we executed a man for a crime that never occurred.

I urge you to recommend that the death penalty be abolished in the State of Montana.

Testimony of

Eve Malo

On Behalf of

Amnesty International

&

Murder Victims' Families for Reconciliation

SB 306

An Act Abolishing the Death Penalty and Replacing it with Life Imprisonment without
Possibility of Release

Senate Judiciary Committee Hearing

February 7, 2007

My name is Eve Malo, from Dillon, Montana. I am representing Amnesty International because of my life long commitment to human rights and I represent Murder Victims Families for Reconciliation because my family was deeply affected by my uncle killing my grandmother. Our family suffered from being the family of the victim and the family of the murderer.

I want to talk about healing for families after a murder has taken place. It is absolutely vital that the victim's friends and family have the supports to heal. However, this is delayed for a variety of reasons:

1, our society and the prosecution often persuade this family that they will feel better after a death sentence is given. But rarely does this happen because over the time between the sentence and the carrying out of the sentence the family is re-victimized at each hearing, at each appeal. The rage continues for years. It is too dangerous to cut the appeals any further because of the 123 death sentence exonerations because the person convicted was found to be not guilty.

2, because the family and friends are waiting for the sentence to be carried out they are not working on the healing process— They have been convinced that “closure” will occur after the execution. Closure is not what we want, there is no such thing as closure. Closure is a myth. We want to find ways to honor the person whose life was taken. We want to remember them on our anniversaries, celebrations, family gatherings and daily. What we do want is to heal by finding ways to honor our loved one.

3, ultimately we find that our loved one is not honored by yet another death. Our pain is not reduced, and the healing process has been delayed too long.

Now let's look at what happens to the family and friends of the condemned. We are often called “shadow victims” or “shadow families” because of what happens to our families. We are ostracized by our communities. I define community as any group of people, church, work, family, school, organization etc. Too often the “shadow victims” lose their

jobs or because they are so marginalized at work they quit. We are made to feel guilty for loving our child, our parent, our sibling and in my case my uncle. It is devastating for a mother or a child to bear the burden of knowing their loved one did something very terrible. There is a generational process which takes place. The children and grandchildren are often affected. There are inestimable social costs to communities as I defined before.

Now I want to talk about what happens if other sentences are considered. In Montana we do have the option of Life in Prison without parole which as Mr. Hilton described is a very harsh punishment. The victim's family is able to start the healing process immediately. Of course there is rage, it would be unnatural if there was not this fury. If we don't want fury to eat our spirits and our health we have to work on healing. The sooner the better!

With life in prison without parole the "shadow victims" can continue with the relationship with their loved one. Children know their parent still loves them. Siblings can cherish the good memories. They can continue with their life and that continued relationship can help with the healing from the sorrow at the offense.

Let me tell you about an incident I experienced. After the killing of my grandmother we moved from the community only to return six years later. In school one of the children started taunting me, "Your uncle's a jail bird" and soon the rest of the children were jeering. Now mind you this was after not being in the town for six years and from a child who could not have had anything to do with our trauma. The difference for me from the children of those on death row, I was able to develop a wonderful relationship with my uncle. Because of family support, though I remember this incident, as well as other incidents, I was not traumatized.

One way we in Montana are helping families of murder to heal is through Victim/Offender dialogue, a bringing together a family member or members of the victim of the murder together with the perpetrator to dialogue about the circumstance of the death. It is a powerful approach to healing. I see this also as a viable way of helping the shadow family. A healing of not just families but a healing of communities.

Creating More Victims Larry Cox Executive Director of Amnesty International USA

The cruelty of the death penalty is not confined to the prisoner whose life is toyed with in the name of justice. Families of the condemned are also ensnared in the cycle of hope and despair that this degrading punishment inevitably breeds. The mistakes and inequities of the capital justice system are perpetuated not only on the defendants, but also their relatives. And in the end, for not measurable benefit, all the state achieves by an execution is one more dead body and more grieving family members.

Testimonials from "shadow families"

Irene Cartwright's son, Richard Cartwright, was executed in Texas in 2005. Richard's daughter Ricki was born a couple of months before Richard was sentenced, and was eight years old when he was executed. One of the hardest things I've had to do was pick Ricki up from school for her last visit with her father before he was killed."

Robert Meeropol's parents, Ethel and Julius Rosenberg, were executed in New York (by the Federal Government in 1953). "I was 3 when my parents were arrested and 6 when they were executed. My earliest distinct memories of my parents are of visiting them on death row. Clearly, I didn't understand what was going on, but I had a sense that "they" were very powerful, and "they" were attacking "us." Of course I didn't know exactly who "they" and "we" were. So I had a generalized sense of anxiety, an incomprehensible sword of Democles hanging over me. I was frightened, angry, and grew up with a suppressed need to attack those who had attacked my family. I survived because a supportive community surrounded me, but what about other children who do not have such a support system?"

Melanie Hebert's uncle, Spencer Goodman, was executed in Texas in 2000. "I vividly remember when Spencer was sentenced to death. It was my Dad's birthday and we were all gathered at my parents' house when we heard it announced on the news. I had a physical reaction; I just felt so sick..."

Bill Babbitt's brother Manny Babbitt, was executed in California in 1999. "The police promised me that my brother would get the help he needed. After they arrested Manny, an officer said to him, "You're not going to go to the gas chamber or anything like that." I believed that. My mother believed it. We never really thought he would be executed, right up until the last half hour when I watched my brother be put to death at San Quentin. For the rest of my life I have to live with the fact that I turned my mentally ill brother in and that led to his death."

The Robinson's have a similar story to tell. They had sought help for their son Larry, who had been diagnosed as a paranoid schizophrenic at the age of 21. He was routinely dismissed from hospitals after 30 day stays because he was not violent and they needed the bed. His only ever act of violence was to kill five people. In spite of his diagnosis and history of hospitalization he was judged sane. He was executed in 2000.